

C A S E S

ARGUED AND DECIDED

AT

N I S I P R I U S

IN

THE COURT OF KING'S BENCH,

At the Sittings after

Easter Term,

In the Fifty-fourth Year of GEORGE III. 1814.

SITTINGS AFTER TERM AT WESTMINSTER.

1814.

Doe d. TITFORD, Assignee of TRUSTRAM, a Bankrupt,
v. CHAMBERS, Gent. One, &c.

Tuesday,
May 24.

EJECTMENT to recover possession of premises situate in
the parish of *Saint Leonard, Shoreditch.*

In 1798, a building lease of the ground in question was granted to *Trustram*, the bankrupt, for 53 years, at the rent of 12 $\frac{1}{2}$ guineas a year, and he erected a manufactory and premises of greater value, with a power of redemption on repayment of the money, and that in the mean time *B.* shall grant *A.* an under-lease of the premises at a greater rent than the legal interest of the money,—*A.* insuring the premises, and paying the ground-rent and taxes,—is usurious; and the assignment of the lease executed under such agreement is void.

An agreement, that upon the advance of a sum of money by *B.* to *A.*, *A.* shall assign to *B.* the lease of

1814. buildings upon it, which cost him 1500*l.* There he continued till the time of his bankruptcy to carry on the business of an umbrella-maker.

DOE
v.
CHAMBERS.

[2] The defendant, who had acted as his attorney, at different times prior to the year 1806 had lent him various sums of money, amounting to 300*l.* at 5 *per cent.* interest. Having met with severe losses in that year, he wanted to borrow a further sum of 600*l.* He accordingly stated his necessities to the defendant, to whom he offered a security on his lease, if he would advance him the money. It was accordingly agreed between them, that the defendant should advance the further sum of 600*l.* making 900*l.* in all; that for this sum *Trustram* should assign the lease to the defendant; that the defendant should then grant to *Trustram* an under-lease of the premises for seven years, at 70*l.* a year,—with a proviso, that at any time within the seven years, *Trustram*, on repaying the 900*l.* should be entitled to a re-assignment, and that by the under-lease *Trustram* should covenant to insure the premises, to keep them in repair, and to pay the ground-rent, together with all taxes, including the landlord's property-tax. An assignment and under-lease in pursuance of this agreement were accordingly prepared, and executed at the same time. The premises for the remainder of the term of 53 years were then worth near 2000*l.*, and they might have been let at from 100*l.* to 120*l.* a year. *Trustram* paid the rent of 70*l.* a year about two years, when he became extremely embarrassed in his circumstances. He afterwards, with the consent of the defendant, tried to sell the premises by auction, and refused an offer for them of 1500*l.* The defendant stated to the auctioneer, that he had 900*l.* upon the premises, for which he received 70*l.* a year. A commission of bankruptcy was sued out against *Trustram* in October 1813, and the under-lease for seven years having then expired, the defendant got into possession of the premises.

Park for the defendant argued, that the assignment of the lease to him was valid, and that the ejectment could not be maintained. Whether he had a good or a bad bargain, the contract was not tainted with usury. During the seven years

of the under-lease, upon the purchase of leasehold-property, he received little more than 7 *per cent.* for his money, which is less than is usually expected. If the under-lease had contained no covenant for redemption, there would have been no pretence for saying that the transaction was usurious; and a right to redeem, which might never be, and in point of fact never was exercised, could not invalidate the assignment.

1814.

DOD

CHAMBERS.

Lord ELLENBOROUGH. The question here is, whether this transaction was a contrivance to receive usurious interest for the loan of money. The defendant actually received 25*l.* a year beyond the legal interest of money. Therefore, if the assignment was intended as a security for the advance, and not as a purchase of the lease, it is void. The assignment and the under-lease are part of the same agreement, and the whole must be viewed together. I agree that without the covenant to re-assign, the transaction could not be set aside in a court of law as usurions. It might be a very hard bargain, and a court of equity might grant relief; but the assignment would be sufficient to vest the legal estate in the defendant. The covenant, however, to re-assign on the repayment of the 900*l.* appears to me to shew that the assignment was merely a security for the loan of money at usurious interest. It was in the nature of a mortgage. Had there been a stipulation that upon the redemption, the 70*l.* a year should be brought into account, and interest in that case only taken at 45*l.* the effect might have been different. But as the deeds really stand; the defendant, had the premises been redeemed, would have received 70*l.* a year as interest upon the 900*l.* advanced. If he ran any risk, or the repayment of the principal was liable to any contingency, there would be no usury; but I see no risk or contingency, involved in the transaction, except the solvency of the borrower. The latter was to insure the premises; to keep them in repair; to pay the ground-rent, and all taxes. The covenant with regard to the property-tax is void; but it shews the nature of the transaction. In short, the defendant advanced money by way of loan; it was in the contemplation of both parties that this should be repaid; it was never put in hazard; and interest above the rate of 5*l.* *per cent.* was to be paid for the forbearance. The assignmen

[4]

1814. executed in pursuance of this agreement is therefore void, and the legal estate is in the assignee of the bankrupt.

DOE
v.
CHAMBERS.

Verdict for the lessor of the plaintiff.

Garrow A. G., Gurney and Campbell, for the lessor of the plaintiff.

Park and Reader for the defendant.

[*Attorneys, Greenwood and Chambers.*]

1814

Friday,
May 27.

BARREY and Another v. TOWNROW.

An action cannot be maintained by the trustees of a benefit society elected under new regulations agreed to by the members, unless these regulations have been confirmed by the quarter sessions, although the original rules of the society

[6]
were controlled, in pursuance of 33 G. 3. c. 54.

TROVER by the plaintiffs as stewards and trustees of "The United Society of Bricklayers," for the books and insignia of the society.

This was a benefit society, the rules of which had been enrolled at the quarter sessions pursuant to stat. 33 Geo. 3. c. 54. According to these rules, the society was to meet at four different public houses, and there were to be two stewards chosen together, who were to remain in office for six months, and then to be succeeded by two others chosen in the same manner. It was afterwards agreed to meet only at one house, and that one steward should be chosen every three months, to remain in office for six, so that there might not be two new stewards coming into office at the same time. These alterations of the rules never were submitted to the quarter sessions.

The books and insignia had been delivered to the defendant by two stewards chosen under the original constitution : but the plaintiffs, who are now the acting stewards, had been chosen at different times, according to the new mode of election.

Garrow A. G. contended that the plaintiffs were entitled to recover by virtue of sec. 11. of 33 G. 3. c. 54. which vests the monies, goods, chattels and effects of these societies in the trustees for the time being.

1814.

BATTLEY
v.
TOWNROW.

Lord ELLENBOROUGH.--The plaintiffs have no right to stand here except by this act of parliament, and the act of parliament gives them no such right, unless they be lawfully elected to the office they now fill. But it appears that they were elected contrary to law, and therefore they cannot maintain this action. The first section of the statute says, that "the rules, orders, and "regulations approved of and confirmed by the justices, shall "be binding upon all parties;" and the second section, which permits an alteration or repeal of these rules, orders, and regulations, with the concurrence of three-fourths of the members, provides, that "such alteration or repeal shall be subject to the review of the justices at the general quarter sessions of the peace, and shall be filed in manner therein before directed, and that no such rule, order, or regulation shall be binding, or have any force or effect until the same shall have been agreed to, and confirmed by such justices, and filed as aforesaid." I cannot look therefore at the rule for altering the mode of electing the stewards; and it is admitted that the plaintiffs were not elected according to the original rule upon this subject confirmed by the quarter sessions. Therefore they are not the legal trustees of the society for the time being, and the effects sought to be recovered never vested in them.

[7]

Plaintiffs nonsuited.

Garrow A.G. and *Burrough* for the plaintiffs.

Park for the defendant.

[Attorneys, *Tarrant and Hughes.*]

Vide *Halliday v. Camsell*, 1 T. R. 658.

1814.

*Saturday,
May 28.**JAMES POWER v. WALKER.*

The assignment of copyright under 8 Ann. c. 19. must be in writing.

A parol agreement between the proprietor of the copyright of a work and another person, that the latter for a valuable consideration shall have the exclusive publication and sale of it in *England*, does not entitle him to maintain any action for pirating the work.

[9]

THIS was an action on 8 Ann. c. 19. for pirating the words of two songs called "Fly not Yet" and "Eveleen's Bower."

These songs were written by *T. Moore*, Esq. and formed part of a work entitled "Irish Melodies," which he sold to *W. Power* of *Dublin*. It was proved that *W. Power* afterwards verbally agreed with the plaintiff, who is his brother, and resides in *London*, that they should make an exchange of copyrights to which they were respectively entitled; that *W. Power* should have the exclusive publication and sale in *Ireland*, of certain works of which the plaintiff was the proprietor, and that the plaintiff should have the exclusive publication and sale in *England* of the "Irish Melodies," (among other works,) of which *W. Power* was the proprietor.

Garrow A. G. for the defendant, objected that the plaintiff was not proved to be the "assignee" of the work, supposed to be pirated, within the meaning of the act of parliament. A valid assignment could only be made in writing; and at any rate, according to the agreement between the two brothers, *W. Power* of *Dublin* still continued proprietor of the work, having merely given the plaintiff a licence to print and publish it in *England*.

Twiss contra contended, there might be a parol assignment of copyright, as there might have been of a lease before the statute of frauds; and that the plaintiff, being assignee in *England*, was entitled to maintain this action for pirating the songs here, in fraud of his exclusive right in this part of the United Kingdom.

Lord Ellenborough was of opinion that the assignment of copyright must be by writing; and that the agreement in this case amounted only to a licence to the plaintiff to print

and publish the work in *England*, and did not make him assignee within the meaning of the act of parliament.

1814.

POWER

v.
WALKER.

Plaintiff nonsuited.

A motion was made in the ensuing term, to set aside the nonsuit; but the Court refused a rule to shew cause,

Twiss for the plaintiff.

Garrow A. G. for the defendant.

[Attorneys, *Finmore and Young*.]

At the Sittings after *Trinity* Term, another action was brought against the defendant for the same piracy, in the name of Mr. *Moore*, the author of the songs. It was suggested by his counsel that he had only verbally agreed to sell the copyright to *W. Power*, so that according to the above decision, in point of law it still remained in him; but the witnesses stated, on cross-examination, that they had heard him declare that he had parted with all his interest in the copyright of the work to *W. Power*, without mentioning in what manner the transfer had taken place. Plaintiff nonsuited.

~~1814.~~

ADJOURNED Sittings at Guildhall.

*Wednesday,
June 1.*

STOCKFLETH v. DE TASTET and Others.

Although a person has been improperly examined before commissioners of bankrupt upon a subject unconnected with the interests of the bankrupt estate, with a view to procure evidence in an action depending against him,

[11]
him, the examination may be used as evidence by the plaintiff at the trial of the action, and the Judge at Nisi Prius cannot inquire into the abuse of the authority of the great seal by which the examination was obtained.—

The remedy of a party so improperly examined, is by an application to the Lord Chancellor to have the examination

THIS was an action of assumpsit, in support of which the plaintiff offered in evidence the examination of Mr. *De Tastet* one of the defendants, under a commission of bankrupt against certain persons who traded under the firm of *Houghton and Co.* It did not appear that the estate of *Houghton and Co.* was interested in the subject matter of the action; but the attorney of the present plaintiff was solicitor to the commissioners and Mr. *De Tastet* was examined before the commissioners, after the action was commenced. Leave had not been obtained from the Lord Chancellor, or from the commissioners, to make use of the examination upon the present occasion.

Scarlett for the defendants contended, that under these circumstances, the examination could not be read in evidence. The bankrupts' estate having no interest in the dispute between these parties, it was a gross perversion of the authority given by the statutes, to examine Mr. *De Tastet* before the commissioners. The examination could only be lawfully used for the benefit of that estate. The solicitor to the commissioners was guilty of a breach of trust in now producing it without the sanction of the Lord Chancellor or the commissioners; and the Court seeing the nature of the attempt made, would not suffer the examination to be thus fraudulently read in evidence.

Lord ELLENBOROUGH.—What you now state may be a very good ground for applying to the Lord Chancellor to have this examination taken off the file of the proceedings under the commission, or to punish those who have abused the authority of the great seal, by examining the party before the commissioners with a view to this action. But I cannot refuse to remove off the file and cancelled.

ceive in evidence an examination signed by one of the defendant~, however it may have been obtained. If he was imposed upon when he signed it, or was under duresse, he will not be bound by it; but I cannot here consider, whether he was properly or improperly summoned before the commissioners or whether the solicitor acts justifiably or unjustifiably in producing the document to support an action in which the assignees of the bankrupts do not appear to have any interest. What is proved to have been written or signed by any of the defendants, I must admit as evidence against them, without considering how it was obtained.

1814.

STOCK-
FLETH
v.
DE TASTET.

[12]

The examination was read, but did not prove the plaintiff's case, and he was nonsuited.

Garrow A. G., Abbott, and Tindal for the plaintiff,

Scarlett and Littledale for the defendant.

Vide *Smith v. Beadnell*, 1 Campb. 30. *Legatt v. Tollervay*, 13 East, 302.

Rex *v.* DIXON.

Wednesday,
June 1.

THIS was an indictment against a baker, for supplying to the Royal Military Asylum at Chelsea, as and for good, wholesome household loaves, divers loaves mixed with certain noxious ingredients, not fit for the food of man, which he well knew so to be at the time he so supplied them.

It was proved on the part of the prosecution, that many of the loaves delivered by the defendant at the Military Asylum on a particular day were found, when cut up and distributed among the children, to be strongly impregnated with alum, and to contain in them several pieces of alum in although he gave directions for mixing it up in a manner which would have harmless.

A baker who sells bread containing alum in a shape which renders it noxious, is

[13]
guilty of an indictable offence, if he ordered the alum to be introduced into the bread, rendered it

1814.

REX
v.
DIXON.

its crystalline form, as large as horse beans. A surgeon stated, that although a very small quantity of allum may be swallowed without injury, if taken in larger quantities it deranges the stomach, and occasions constipations of the bowels; that its tendency is injurious to health, and that it is unfit for the food of man. Stat. 37. G. 3. c. 98. s. 21. was likewise referred to, by which the use of allum is prohibited in the making of bread, under a penalty.

For the defendant his foreman was called, who stated that he usually employed allum in making bread, to assist the operation of the yeast, and to make the loaves look white; but that very great care was employed in the use of it; that he allowed not more than half a pound of allum to a sack of flour, from which 84 loaves are made; that his custom was to dissolve the allum and mix it with the yeast, that it might be equally divided over the batch; that allum so used could hurt no one; and that if on any particular occasion, the loaves delivered at the Military Asylum had allum put into them in a different manner, it was quite contrary to the directions and intentions, and wholly without the knowledge or privity, of the defendant.

[14]

It was contended, that these facts completely negatived the averment in the indictment, that the defendant at the time these loaves were delivered, well knew they were not wholesome, and that they were unfit for the food of man. He could not be criminally responsible for the acts of his servants. Had the allum on this occasion, contrary to his directions, been so introduced into the bread as to produce death, would he have been guilty of murder? If not, he must be acquitted upon this indictment. He is not now charged upon the statute for using allum in bread, but for the common law offence of selling bread which he knew to be of a noxious quality. When these loaves were delivered, he unquestionably believed they were made in the same manner as those which he had been accustomed to supply to the Military Asylum, and which gave perfect satisfaction.

Lord ELLENBOROUGH.—Whoever introduces a substance

into bread, which may be injurious to the health of those who consume it, is indictable, if the substance be found in the bread in that injurious form, although if equally spread over the mass, it would have done no harm. If a baker will introduce such a substance into his bread, he must do it at his own hazard, and he must take especial care that the benefit he proposes to himself, does not produce mischief to others. He is engaged in an illegal act, and he must abide the consequences. The statute 37 Geo. 3. c. 98. shews the judgment of the legislature with regard to allum; and a medical gentleman has given evidence as to its deleterious effects. If taken in very minute quantities, it is innoxious. The same may be said of calomel, and even of arsenic.* But would not a baker be answerable for selling bread having these substances mixed with it in a dangerous form, although he intended they should be so equally subdivided over the whole mass which he baked at one time, that no harm could follow? If the defendant was cognizant of the manner in which his business was carried on, and knew that allum was at all used in the making of the loaves sent to the Military Asylum, which are proved to have contained it to a very dangerous degree, he is guilty on this indictment.

The defendant was convicted; and the point being mentioned in bank next term, the Court fully concurred in the direction of the judge at Nisi Prius.

Garrow A. G. Park, and Walton for the crown.

Scarlett, Barrow, and Brougham for the defendant.

[Attorneys, *Foss and Barrow.*]

1814.

Rex
v.
DIXON.

[15]

1814.

*Thursday,
June 2.*

REX v. BARR.

Where a way has been used by the public for a great number of years over a close in the hands of a succession of tenants, the privity of the landlord, and a dedication by him to the public may be presumed, although he was never in the actual possession of the close himself, and he is not proved to have been near the spot.

Where a way is so used, notice of the fact to the steward is notice to [17] the landlord.

THIS was an indictment for stopping up a public footway leading from *Stoke Newington* to *Islington*.

The way passes over land which belongs to the Marquis of *Northampton*. It was proved to have been used by the public upwards of 50 years. During the whole of that time, the land has been occupied by a succession of tenants. One of these frequently complained to Lord *Northampton*'s steward, that the public used the footway, whereby the land was injured; but no action was brought, either by landlord or tenant, against any one who used it. The defendant has lately taken a lease of the land over which the way passes, and inclosed it with a wall.

His counsel contended, that the above facts did not establish a public right of way over the *locus in quo*, as the user proved had been exclusively during the occupation of successive tenants, whose acquiescence could not bind the reversioner. There was here no evidence of a dedication to the public by the landlord, who alone had power to dedicate.

Lord ELLENBOROUGH.—After a long lapse of time, and a frequent change of tenants, from the notorious and uninterrupted use of a way by the public, I should presume that the landlord had notice of the way being used, and that it was so used with his concurrence. In this case, however, we have express evidence of notice; for notice to the steward was notice to the landlord.

The defendant was found guilty.

Garrow, A. G., Gurney, and Walford for the prosecution.

Scarlett and Harrow for the defendant.

[*Attorneys, Keyse and Rosser*]

Vide *Rex v. Lloyd*, 1 Campb. 261. *Trustees of Rugby Charity v. Merryweather*, 11 East, 375. n.

1814.

STILL and Another v. HALFORD.

*Saturday,
June 4.*

THIS was an action of assumpsit, for non-payment of money pursuant to an award. The declaration stated that by an order of Lord *Ellenborough* made in a former cause, all matters in difference between the parties in the said cause were referred to the award of *D. M.*, *W. L.*, and such third person as they the said *D. M.* and *W. L.* should appoint, previous to their entering upon the reference, so as they, or any two of them, should make and publish their award in writing, on or before a given day.

To prove the Judge's order, the plaintiff put in the rule, making it a rule of court.

J. Parke, for the defendant, objected that the judge's order, as the best evidence, ought itself, to be produced.

Lord *ELLENBOROUGH*.—I think the rule of court is sufficient: I must give credit to it, that there was such an order as is there recited. The Court adopt and act upon it.

The declaration stated that the said *D. M.* and *W. L.* took upon themselves the burden of the said award; and in pursuance of the said order, and previous to their entering upon the said reference, to wit, on, &c., did nominate and appoint one *E. A.* as a third person or arbitrator in the premises.

An award was given in evidence, signed by *D. M.*, *W. L.*, and *E. A.*, which recited that the said *D. M.* and *W. L.*, previous to their entering upon the said reference, did, by writing under their hands, nominate and appoint the said *E. A.* as a third person or arbitrator in the premises. It was likewise proved, that *E. A.*, in the course of the arbitration,

In an action on an award made under a Judge's order,—to prove the order, it is enough to put in an office copy of the rule, making it a rule of court.

In such an action, where the submission is to *A.* and *B.*, and such third person as they shall appoint, to satisfy an allegation that *A.* and *B.* appointed *C.*, it is not enough to put in an award executed by all the three, reciting that *A.* and *B.* did appoint *C.*—and to prove that *C.* acted along with them in the arbitration.

[19]

1814. had acted with the two others ; but no further evidence could be adduced of his appointment.

**STILL
v.
HALFORD.**

It being objected that the writing should be produced and proved, by which the appointment took place, the plaintiffs' counsel argued that the recital in the award signed by all the arbitrators was sufficient ; and at any rate, that the fact of the appointment was proved from the three having acted together during the arbitration.

Lord ELLENBOROUGH.—I cannot take the recital of the award as evidence of the appointment ; and I think the plaintiffs are bound to prove some act by which the appointment was made. There must have been a formal act of appointment ; after which, the two arbitrators named in the order were as to that *functi officio*. Their merely suffering the third person to sit along with them, and to sign the award, would not be sufficient to vest him with any authority.

Plaintiff's nonsuited.

Park and Espinasse for the plaintiffs.

J. Parke for the defendant.

[Attorneys, *Taylor and Denuds.*]

[20] So where the award appears to have been made out of the time originally given to the arbitrator by the rule of Court, which reserved to him the power of enlarging the time, it is not enough for obtaining an attachment for non-performance of the award, that the arbitrator states in his award that he had enlarged the time, without verifying the fact by affidavit. *Davis v. Vass*, 15 East, 97.

1814.

TEMPANY v. BURNAND.

*Saturday,
June 4.*

COVENANT on a lease for not repairing the premises. The declaration stated the covenant in the indenture to be, "that the defendant, his executors, administrators, and assigns, should and would, at all times during the said term so demised by the said lease, at his and their own proper costs and charges, well and sufficiently repair, uphold, &c. the said demised messuage or tenement, and premises, with the appurtenants in, by, and with all and all manner of needful and necessary reparations, &c. and the said messuage or tenement, and premises, with the appurtenants so being well and sufficiently repaired, &c. should and would, at the end, expiration, or other sooner determination of the said term, peaceably and quietly leave, surrender, and yield up to the said plaintiff, his executors, administrators, or assigns, in as good plight and condition as the same, at the time of the making of the said indenture then were."—The only plea was *non est factum*.

[21]

The counterpart of the lease, proved to have been executed by the defendant, contained the words above recited, but with the following qualification subjoined: "fire and all other casualties excepted."

The objection being taken, that this was a fatal variance, it was answered on the other side, that the recital was true as far as it went, and that it lay upon the defendant to have pleaded that the dilapidated state of the premises arose from fire or some other casualty.

Lord ELLENBOROUGH.—The declaration sets out an absolute covenant to repair the premises, under which the defendant would have been compellable to rebuild the house, had it been burnt down by an accidental fire. (a) The covenant in

In covenant for not repairing, if the covenant to repair contains an exception of "fire and all other casualties," it is fatal on *non est factum*, to state it as a general covenant to repair, omitting the exception.

1814. the lease put in contains an exception of fire and other casualties. I think the defendant is entitled to take advantage of this variance on *non est factum*. He is not proved to have executed a deed containing an absolute covenant to repair.

Plaintiff nonsuited. (*a*).

[22] *Marryat and Cross* for the plaintiff.

Park for the defendant.

[*Attorneys, Martindale and Lyons*]

(*a*) Vide *Howell v. Richards*, 11 East, 633.

*Saturday,
June 4.*

MEYER v. EVERETT and Another.

Where upon a sale of goods, the seller produces a sample, and represents that the bulk is of equal quality, if there be a sale-note which does not refer to the sample, this is not a sale by sample, and if the goods turn out to be of inferior quality, the purchaser's remedy is by an action on the case for a deceitful representation.

THE declaration stated, that in consideration that plaintiff, at the request of the defendants, would buy of them 50 hogsheads of *Hambro'* sugar loaves, at 155s. per cwt., free on board a *British* ship, to be paid for by an acceptance at 70 days, the defendants undertook that the said sugar was then and there all of like goodness with a certain sample of sugar then and there produced and shewn by the defendants to the plaintiff. An averment followed that the plaintiff bought the sugar,—with a breach, that it was not equal to the sample.

The bought-note put in was in the usual form, merely describing the goods as “ 50 hogsheads of *Hambro'* sugar loaves, “ at 155s. free on board of a *British* ship. Acceptance at 70 days.” .

Garrow A. G. submitted that the plaintiff must be nonsuited, as the contract produced contained no stipulation that the sugar was equal to sample.

Abbott, contrà, said, he should prove that at the time when the sugar was purchased, the defendants exhibited a sample, and represented that the bulk was equal in quality; whereas a fraud had been practised upon the plaintiff, for the sugar sold to him was of greatly inferior quality and value.

1814.

MEYER
v.
EVERETT.

Lord ELLENBOROUGH.— You should have declared in case for a deceitful representation. It was no part of the contract that the sugar should be equal to the sample. Where goods are sold in this way, I think evidence might be admissible to shew that, at the time of the sale, a sample was fraudulently exhibited to deceive the buyers, whereby the plaintiff had been induced to purchase the commodity, which turned out of greatly inferior quality and value. But when the sale note is silent as to the sample, I cannot permit it to be incorporated into the contract. This would be contrary to *Meres v. Ansell* (*a*) and would amount to an admission of parol evidence to contradict a written document. In truth, the present was not a sale by sample; and the sample can only be used as evidence of a deceitful representation.

Plaintiff nonsuited.

Abbott and Tindal for the plaintiff.*Garrow A. G. and F. Pollock*, for the defendants.

[24]

[Attorneys, *Montrion and Wilde*.](*a*) 3 Wils. 275.

Vide *Gardiner v. Gray*, post. *Laing v. Fidgeon*, post. *Parkinson v. Lee*, 2 East, 314.

1814.

COMMON PLEAS.

STROTHER v. WILLAN and Others.

The entry in
the office in
Somerset
House for
licensing
stage
coaches is
no evidence
to prove
that the
persons
named in
the licence
are owners
of the coach.

THIS was an action against the defendants, as owners of the *Stroud* coach, for the loss of a parcel.

To prove the ownership, the counsel for the plaintiff put in the entry in the book, kept in the proper office in *Somerset House*, stating the defendants to be licensed as owners of this coach, and contended that as the entry was made in pursuance of an act of parliament (*a*), it must be presumed to be accurate, and was at any rate *prima facie* evidence.

[25] GIBBS, C. J.—This entry not being signed by the defendants, and nothing being shewn to connect them with it, I am of opinion that it is no evidence whatever, to prove them to be the owners of the coach. It is clearly not evidence at common law; and no act of parliament is pointed out to me, to make it evidence of ownership.

Plaintiff nonsuited.

Copley, Serjeant, and Campbell, for the plaintiff.*Vaughan, Serjeant, and Abbott*, for the defendant.[Attornies, *Blandford and Tilbury*.]

(a) 25 Geo. 3. c. 51. § 50, 51.

Vide *Tinkler v. Walpole*, 14 East, 226. *Flower v. Young*, 3 Campb. 240.

C A S E S

ARGUED AND DECIDED

AT

NISI PRIUS

IN

THE COURT OF KING'S BENCH,

At the Sittings after

Trinity Term,

In the Fifty-fourth Year of GEORGE III. 1814.

FIRST SITTINGS AFTER TERM AT WESTMINSTER.

DAVENPORT v. ANNA MARIA NELSON, Widow.

*Thursday,
June 30.*

GOODES sold. Plea, coverture.

Park, for the plaintiff, undertook to prove, that at the time the debt was contracted, the defendant had declared she was a widow; that she had executed deeds by this description, and that denominating herself a widow, she had sued out writs and carried on actions at law. He contended that by these declarations and acts she was estopped from giving evidence that she was then a feme covert. However,

A woman who has declared herself to be a feme sole, and as such has executed deeds and maintained actions, if herself sued as a feme sole, is not estopped from setting up the defence of coverture.

1814.

Lord ELLENBOROUGH held, that she was at liberty to do so, and it was satisfactorily proved that before the debt was contracted, she was married to a man who is still alive.

DAVEN-
PORT
v.
NELSON

Plaintiff nonsuited.

Park and Gurney for the plaintiff.

Garrow A.G. and Marryat for the defendant.

[Attorneys, *Vincent and Hulme.*]

Vide *Wilson v. Mitchell*, 3 Campb. 393.

Thursday,
June 30.

BAKER, Widow, Executrix, &c. v. TYRWHITT.

In an action by an executor, the residuary legatee is not rendered a competent witness for the plaintiff, by releasing all claim to the debt sought to be recovered, having still an interest to support

[28]
the action,
that the
costs may
not be a
charge up-
on the
estate.

THIS was an action to recover a debt due to the testator. For the plaintiff, a witness was called, who upon the *voire dire* appeared to be the residuary legatee. To render him competent, a release was produced which he had executed, releasing all his claim to the debt in question. But, the point being argued,

Lord ELLENBOROUGH held, that he was still incompetent. If the plaintiff failed in the suit, although she would not be liable for costs to the opposite side, she must pay costs to her own attorney. These she would be entitled to be allowed out of the estate, the action being brought *bona fide*; and thus, independently of the debt to be recovered, the *residuum* would be diminished. Therefore, after releasing all right to that debt, the witness has still an interest to support the action, and could only be rendered competent to give evidence for the plaintiff, by releasing the residue altogether, or by the attorney releasing to the plaintiff the costs of the action.

The witness was rejected.

Park and Scarlett for the plaintiff.

1814.

Garrow A. G. and Marryat for the defendant.

BAKER
v.
TYRWHITT

[Attorneys, *Turner and Cockayne*.]

ALVES v. BUNBURY.

Thursday,
June 30.

THIS was an action of debt on a judgment of the Court of King's Bench and Common Pleas, in the Island of *St. Vincent*. Plea, *nil debet*.

The plaintiff offered in evidence as the judgment a document to which no seal was affixed, but which was signed by Mr. *Smart*, the Chief Justice of *St. Vincent*, and was accompanied by a certificate under the private seal of Sir *Charles Brisbane*, the governor of the island. The only witness examined stated, that he had lived twenty years in *St. Vincent*'s and that he had seen many documents transmitted from thence signed and certified in the same manner; he had never seen any seal of the Court of King's Bench and Common Pleas there; but he did not know that he had ever seen any judgment of that Court.

In an action on a foreign judgment, the judgment produced at the trial must be authenticated. [29] Ticated by the seal of the foreign Court; or evidence must be given that the Court has no seal; and then the judgment may be established by proving the signature of the Judge.

Lord *Ellenhorough* intimated an opinion that the judgment was not sufficiently authenticated by this evidence. He said it ought either to be proved under the seal of the Court, or distinct evidence should be given that the Court had no seal, and verified its judgments by the signature of the Chief Justice.

Garrow A. G., for the plaintiff, contended that upon this evidence it ought to be presumed that the Court had no seal, and that the signature of the Chief Justice was sufficient, particularly when accompanied by the official certificate of the Governor. He offered to prove that the Chief Justice of *St. Vincent* is not appointed under any charter or letters patent

1814.

ALVES
v.
BUNSBURY.

by the Crown,—from whence it might be inferred, that his Court has not a seal, as the courts in some of the other islands have whose constitution is different.

[30]

Lord ELLENBOROUGH.—I do not think that evidence will advance the plaintiff's case. Let him prove satisfactorily that this Court has no seal, and that the document he produces is authenticated in the manner that judgments of that Court usually are; and I will receive it as a judgment. But till the contrary is proved, I will presume that the Court has a seal, whatever may be the constitution of the colony. Suppose this purported to be the judgment of a court sitting in the dominions of a foreign state, I should make the same presumption, and require the same evidence. By the *comitas gentium*, the courts of different countries will recognize and enforce the judgments of each other; but these judgments are to be authenticated under the seals of the courts by which they are pronounced. Here we have no evidence whatever to shew that judgments of the Court of King's Bench and Common Pleas in the island of *St. Vincent* are merely signed by the Chief Justice; for the only witness examined never saw a judgment of the Court before the one now put into his hands.

Plaintiff nonsuited.

Garrow A. G. and *Andrews* for the plaintiff.

Scarlett and *Campbell* for the defendant.

[Attorneys, *Wingfield* and *Bronell*]

Vide *Henry v. Adey*, 3 East, 221. *Buchanan v. Rucker*,
1 Campb. 63.

1814.

FIRST Sittings AFTER TERM IN LONDON.

VIRTUE and Another v. JEWELL.

Friday,
July 1.

TROVER for 180 quarters of barley.

On the 30th of November 1813, this barley was shipped at *Yarmouth*, by *Daniel Bloom*, on board the sloop *Dolphin*, of which the defendant was master. The bill of lading made the barley deliverable in the port of *London*, to the order of the shipper, and was indorsed by him to *Burrows and Winn*, corn-factors and corn-merchants in the city. They received the bill of lading on the 4th of *December*.—In the month of *October* preceding *J. W. Ayres*, for their accommodation, had accepted a bill for 350*l.*, which was to become due in nine days, and they owed him several hundred pounds besides on another account. They had then, to the knowledge of *Ayres*, become much embarrassed in their affairs, and unable to provide for the bill of exchange. They, therefore, for the purpose of covering him, of their own accord purposed to indorse to him the bill of lading of the barley. They accordingly did so on the 6th of *December*, and made out a regular sale note to him. On the same day, they stopped payment. *Ayres* immediately after indorsed the bill of lading, and made out a similar sale note to the plaintiffs. The bill of exchange for 350*l.*, which *Burrows and Winn* had negotiated, he paid regularly when it became due. The *Dolphin* arrived in the river *Thames* on the 17th of *December*, and the barley being then demanded by the plaintiffs, the defendant refused to deliver it, having had an indemnity from *Bloom*, the consignor. At the time it was shipped, and from thence, till the indorsement of the bill of lading by *Burrows and Winn*, *Bloom* was indebted to *Burrows and Winn*, upon the balance of accounts, including bills of exchange then running, which they accepted for him to the amount of 590*l.*, being considerably more than the value of the barley, and it was on account of this balance that

A., being indebted to
B., on the
balance of
accounts,
including
bills of ex-
change still
running ac-
cepted by
B. for *A.*,
consigns
goods to *B.*
on account
of this bal-
ance. Held
that *A.* has
no right to
stop the
goods in
transitu,
upon *B.*
becoming
insolvent
before the
bills are
paid.

The right
of an unpaid
consignor
to stop in
transitu is
not taken
away by an

[32]
assignment
of the bill of
lading for a
valuable
considera-
tion to a
third per-
son, with
notice of
the insol-
vency of the
consignee.

1814. — the barley was consigned to them. The bills so accepted were never paid by *Burrows and Winn*, who became bankrupt in the end of *December*, and were then indebted to *Bloom* above 2000*l.*

**VERTE
V.
JEWELL.**

[33]

LORD ELLENBOROUGH ruled, that under these circumstances *Bloom* had no right to stop *in transitu*. The barley being consigned to *Burrows and Winn* on account of the balance which then existed in their favour, the property vested in them absolutely. The transfer from them to *Ayres* would not have defeated the right to stop *in transitu*. If the consignee does indorse the bill of lading for a valuable consideration to a *bonâ fide* purchaser without notice, the right to stop *in transitu* is gone as against the indorsee, although it would have remained in force as against the consignee, had the bill of lading not been indorsed. But *Ayres* here had notice of the insolvency of *Burrows and Winn*; and if against them there existed any right to stop *in transitu*, he could not claim the barley. The circumstance, however, of *Bloom* being indebted to them on the balance of accounts divested him of all controul over the barley from the moment of the shipment. The non-payment of the bills of exchange cannot be considered. The rights of the parties must depend upon the state of things when the bill of lading was signed and indorsed.

Verdict for the plaintiffs.

In the ensuing term the Court refused a rule to shew cause why the verdict should not be set aside, observing, that under these circumstances *Burrows and Winn* were to be considered the purchasers of the goods for a valuable consideration.

Garrow A.G. and *Campbell* for the plaintiffs.

Park and *Gurney* for the defendant.

[Attorneys, *Osbaldston* and *Windus*.]

Vide *Haille v. Smith*, 1 Bos. & Pul. 563. *Kinloch v. Craig*, 3 T. R. 119.

1814.

ADJOURNED Sittings at Westminster.

MIDDLETON v. SANDFORD.

*Saturday,
July 2.*

DEbt on a replevin bond. The declaration stated the bond to have been executed jointly by the defendant, one *James Bryant*, and one *William Watson*. Pleas, first, that the bond was not the deed of the defendant; and, secondly, that it had not been assigned by the sheriff.

The attesting witness said he was unacquainted with the defendant, but that a person, whom he had not seen before or since, executed the bond in his presence, in the name of *Thomas Sandford*.

The plaintiff's counsel contended that it must be presumed that this person was *Thomas Sandford*, the defendant. But,

DAMPTON, J. held that some evidence of identity was indispensably necessary. Even presuming that the name of the person who executed this bond was *Thomas Sandford*, how did it appear that this was the *Thomas Sandford* sued in the present action? His Lordship said he had had occasion to know that great difficulty was often found in proving the identity of parties who had executed Custom-house bonds; but that some evidence for that purpose was always considered necessary.

It was then shewn that the defendant had acknowledged he was the person who had replevied; but no circumstance was adduced to shew the identity of the other two obligors.

If in an action on a bond against one, it be declared on as the joint bond of him and two others, it is no variance that the bond is likewise the separate bond of each of the obligors.

Where issue is joined on non est factum, some evidence must be given of the identity of the party executing the deed, which is not to be presumed from its having been executed by a person in his name, in the presence of the attesting witness, who was unacquainted with him.

If a bond be declared upon as the joint bond of the defendant and two other persons, and the defendant

[35]
pleads that it is not his deed, at the trial it is only necessary to prove that the bond was executed by the defendant.

1814.

MIDDLETON
v.
SANDFORD.

Lawes, for the defendant, thereupon insisted that a non-suit should be directed. The meaning of the plea was, that the defendant had not executed the bond *modo et forma*, that is to say, with the other two supposed obligors. The execution by each of them was therefore put in issue. In assumpsit, where one of several defendants pleads the general issue, the plaintiff must prove a joint promise by all, and here a joint execution by all those alleged to be joint obligors was equally necessary.

DAMPIER, J. What is the issue? Simply, that the writing obligatory mentioned in the declaration is not the deed of the defendant. The execution of the bond by the defendant is all that is denied, and when that is established I think the issue must be found for the plaintiff.

The bond being read, it appeared to be the several as well as the joint bond of the obligors; upon which an objection was made that this was a fatal variance; and *Willey v. Cawthorne*, 1 East, 398. was relied upon, in which it was held that a memorial under the annuity act of a bond, stating that *A.* and *B.* severally became bound, is not sufficient in law, if the bond be joint as well as several.

[36]

DAMPIER, J. Whatever minuteness of description may be required in a memorial under the annuity act, I think this bond is sufficiently described in the declaration. If the objection were well founded, in declaring separately against one obligor upon a joint and several bond, it would be necessary to allege it to be joint as well as several, which is contrary to the established practice of pleading.

The assignment of a replevin bond by a person acting in the sheriff's office, under the seal of the office, is sufficient.

The assignment appeared to have been written and signed not by the sheriff or under-sheriff, but a person accustomed to act in the sheriff's office in the name of the sheriff, and was under the seal of the office.—This was held sufficient evidence of the assignment.

Verdict for the plaintiff.

Taddy and J. Parke, for the plaintiff.

1814.
MIDDLE-
TON
v.
SANDFORD.

Lawes for the defendant.

[Attornies, *Fisher and Saundard*.]

[37]

BRANDON *v.* HIBBERT.

Saturday,
July 2.

THIS was an action for money had and received, to recover the sum of 10*l.*

On the 29th of September last, the plaintiff being in company with his butcher, the latter observed he must raise the price of meat from 9*d.* to 10*d.* a pound. The plaintiff then offered a wager of 10*l.* to 5*l.* that one *Francis* would serve him with meat for three months from that day at 9*d.* a pound. The wager was accepted, and it was agreed between the parties that the money should be immediately paid into the hands of the defendant, who happened to be present, and that the question should be left to his decision. The defendant decided that the plaintiff had lost, and refused to pay him back his 10*l.*

An action cannot be maintained to recover back money deposited with a stake holder upon a wager, after the wager has been determined against the plaintiff.

Dampier, J. held that under these circumstances the action could not be maintained, and directed a

Nonsuit.

Garrow A. G. and *Reader* for the plaintiff.

Park for the defendant.

[Attornies, *Fielder and Wellingham*.]

Vide *Bland v. Collet*, post.

1814.

*Saturday,
July 2.***DOWDEN v. FOWLE, Esq.**

In an action against the sheriff of Wiltshire, for a false return to a writ of *fi. fa.*; and the question was, whether a commission of bankrupt sued out against one *Matcham*, the party whose goods were to be taken in execution, was valid.

THIS was an action against the sheriff of *Wiltshire*, for a false return to a writ of *fi. fa.*; and the question was, whether a commission of bankrupt sued out against one *Matcham*, the party whose goods were to be taken in execution, was valid.

This depended chiefly upon the sufficiency of the petitioning creditor's debt. On the part of the defendant, evidence was given that when the act of bankruptcy was committed, and down to the time when the commission was sued out, the bankrupt owed the petitioning creditor a balance of more than 100*l.*

In answer, the plaintiff proposed to prove that subsequently to the suing out of the commission, there had been a settlement of accounts between the bankrupt and the petitioning creditor, and that the latter then acknowledged that the balance due to him at the time of the act of bankruptcy, and subsequently, did not exceed the sum of 8*l.* It was suggested that the assignees (of whom the petitioning creditor was one) had indemnified the sheriff; but there was no direct proof of that fact. However, it appeared that the instructions for the defence had come from the assignees.

[39]

Marryat, for the defendant, contended that nothing which the petitioning creditor had done or said subsequently to the commission could be evidence against the sheriff. The most injurious consequences to third persons would follow if the petitioning creditor could upset the commission by a simple declaration made after he had sworn to the existence of the debt. Nothing said by the bankrupt subsequently to the commission is evidence to support the petitioning creditor's debt, and nothing subsequently said by the petitioning creditor can be received to impeach it.

DAMPIER, J. The assignees appearing to be the real parties to this action, I think the subsequent declaration of the petitioning creditor is receivable. Although he once swore to the existence of a debt of 100*l.*, upon a farther investigation of the accounts he might have found he was mistaken. Unfortunately, commissions are often found invalid upon mistakes of this nature.

1814.

DOWDEN
v.
FOWLE.

The evidence was received, but did not come up to what was expected, and the plaintiff was

Nonsuited.

Garrow A. G. and Gaselee for the plaintiff.

Marryat and A. Moore for the defendant.

[Attorneys, *Duncombe* and *Emily*.]

DOWN v FROMONT.

[40]

THIS was an action against a common carrier for the loss of a package delivered to him for the purpose of being carried by his waggon from *London* to *Glastonbury*.

The package consisted of a hamper-basket, the dimensions of which were about 12 by 18 inches, containing raw materials for the making of 36 beaver hats, value 22*l.*

The defence rested upon the effect of a notice in the following form, stuck up in the office where the business of the office is transacted:

"Take notice, That the proprietors of the public carriages who transact their business at this office will not be answerable for any package containing cash, bank notes, bills, jewels, plate, or watches, however small the value may be, nor for

The usual notice given by carriers exempts them from their liability for the loss of goods above the value of 5*l.* unless the appearance of the goods necessarily indicates that they are above that value.

1814.

*Saturday,
July 2.*

DOWDEN v. FOWLE, Esq.

In an action against the sheriff of Wiltshire, for a false return to a writ of *fi. fa.*: and the question was, whether a commission of bankrupt sued out against one *Matcham*, the party whose goods were to be taken in execution, was valid.

This depended chiefly upon the sufficiency of the petitioning creditor's debt. On the part of the defendant, evidence was given that when the act of bankruptcy was committed, and down to the time when the commission was sued out, the bankrupt owed the petitioning creditor a balance of more than 100*l.*

In answer, the plaintiff proposed to prove that subsequently to the suing out of the commission, there had been a settlement of accounts between the bankrupt and the petitioning creditor, and that the latter then acknowledged that the balance due to him at the time of the act of bankruptcy, and subsequently, did not exceed the sum of 8*l.* It was suggested that the assignees (of whom the petitioning creditor was one) had indemnified the sheriff; but there was no direct proof of that fact. However, it appeared that the instructions for the defence had come from the assignees.

[39]

Marryat, for the defendant, contended that nothing which the petitioning creditor had done or said subsequently to the commission could be evidence against the sheriff. The most injurious consequences to third persons would follow if the petitioning creditor could upset the commission by a simple declaration made after he had sworn to the existence of the debt. Nothing said by the bankrupt subsequently to the commission is evidence to support the petitioning creditor's debt, and nothing subsequently said by the petitioning creditor can be received to impeach it.

DAMPIER, J. The assignees appearing to be the real parties to this action, I think the subsequent declaration of the petitioning creditor is receivable. Although he once swore to the existence of a debt of 100*l.*, upon a farther investigation of the accounts he might have found he was mistaken. Unfortunately, commissions are often found invalid upon mistakes of this nature.

1814.

DOWDEN
v.
FOWLE.

The evidence was received, but did not come up to what was expected, and the plaintiff was

Nonsuited.

Garrow A. G. and *Gaselee* for the plaintiff.

Marryat and *A. Moore* for the defendant.

[*Attorneys, Duncombe and Emily*] 

DOWN v FROMONT.

[40]

THIS was an action against a common carrier for the loss of a package delivered to him for the purpose of being carried by his waggon from *London* to *Glastonbury*.

The package consisted of a hamper-basket, the dimensions of which were about 12 by 18 inches, containing raw materials for the making of 36 beaver hats, value 22*l.*

The defence rested upon the effect of a notice in the following form, stuck up in the office where the business of the office is transacted :

"Take notice, That the proprietors of the public carriages who transact their business at this office will not be answerable for any package containing cash, bank notes, bills, jewels, plate, or watches, however small the value may be, nor for

The usual notice given by carriers exempts them from their liability for the loss of goods above the value of 5*l.* unless the appearance of the goods necessarily indicates that they are above that value.

- 1814.** any package of more than 5*l.* value, if lost or damaged, unless the same is specified when delivered into this office."

DOWN

v.
FROMONT.

- [41] There was no specification of the value of the package in question; but it was contended on the authority of *Beck v. Evans*, 16 East, 244. 3 Campb. 267. that this under the circumstances was unnecessary, and that the notice therefore did not protect the defendant from his common law responsibility.

Lord ELLENBOROUGH. I do not think the case cited governs the present. There, the carrier knowing that the article intrusted to him was a cask of brandy, necessarily knew that it was above the value of 5*l.* But here, what was there to indicate to the defendant the contents or value of this package? It might have contained cash, bank notes, plate, or watches, to the amount of 1000*l.*, or it might have been filled with coarse materials not worth 40*s.* It therefore appears to me to be a package within the meaning of the notice. I am very sorry for the conveniences of trade, that carriers have been allowed to limit their common law responsibility, and some legislative measure upon the subject will soon become necessary. But I feel myself bound by the decisions, that such notices, in cases where they apply, constitute a special contract between the parties.

Plaintiff nonsuited.

Park and E. Lawes for the plaintiff.

Garrow A.G. and Topping for the defendant.

[Attorneys, *Whiteaker and Hurst.*]

Vide *Wilson v. Freeman*, 3 Campb. 527.

1814.

MORTIMER v. SALKELD.

DEBT on bond in the penal sum of 4000*l.* Pleas, 1st, *non est factum*; 2dly, *onerari non*, because after the making and passing of a certain act of parliament, made and passed in the 49th year of the reign of His present Majesty, entitled, "An act for granting to His Majesty a sum of money to be raised by lotteries," to wit, on the 7th day of *February*, in the year of our Lord 1810, at *Westminster* aforesaid, a certain illegal and corrupt contract was made by and between plaintiff and defendant, in the nature of a wager relating to the then future value of certain public securities; that is to say, the tickets composing a public lottery, which was then about to be drawn in pursuance of the directions and provisions of the said act; such value to be determined according to the produce of the whole of the tickets composing the said lottery, to the contractors with government for the same, and by which said illegal and corrupt contract it was then and there against the form of the statute in such case made and provided, agreed by and between plaintiff and defendant, that in case the whole of the tickets composing the said lottery should produce to such contractors more than at and after the rate of 33*s.* upon each and every ticket, plaintiff should pay to defendant the proportionate amount of the produce to such contractors of divers, that is to say, 500 tickets in and parcel of the said lottery, clear of the prime cost therof, and all expences over and above the sum of 33*s.* for each and every of the tickets in the said lottery; but in case the whole of the tickets composing the said lottery should not produce to the said contractors so much money, as at and after the rate of 33*s.* upon each and every ticket, defendant should pay to plaintiff so much money as the proportion of 500 tickets therein should produce to the said contractors, clear of the prime cost and all expences, less than at and after the rate of 33*s.* upon each and every ticket in the said lottery: that on the 14th of *February*, in the year last aforesaid, at *Westminster* aforesaid, the said lottery was drawn, and that the whole of the tickets composing the said lottery produced to the said

Dealing in
lottery pro-
duces is not
within the
stock-job-
bing acts.

[43]

1814.

~~MORTIMER
v.
SALKELD.~~

contractors, clear of the prime cost, and all expences, less than at and after the rate of 33s. that is to say, the sum of 1*l.* 7*s.* 3*d.* upon each and every ticket composing the said lottery, and no more, by reason whereof defendant, upon the said illegal and corrupt contract, in the nature of a wager as aforesaid, then and there lost to plaintiff the sum of 14*3l.* 15*s.* of lawful money, &c. : that the said loss having been ascertained between defendant and plaintiff, it was on the 3d of May, in the year last aforesaid; further corruptly and unlawfully agreed by and between plaintiff and defendant, that for securing the payment of the said sum of money so lost as aforesaid, together with divers other sums of money which plaintiff then and there claimed and alleged to be due and owing to him from defendant ; defendant should make, seal, and as his act and deed deliver to plaintiff the said writing in the said declaration mentioned, with the said condition thereunder written ; and that in pursuance of such last mentioned corrupt and unlawful agreement, defendant on the said 3d day of *May*, at *Westminster* aforesaid, made, sealed, and as his act and deed delivered the said writing in the said declaration mentioned ; and plaintiff then and there corruptly and illegally received the said writing, with the said condition thereunder written, of and from defendant, in pursuance of the said corrupt and unlawful agreement, and for the consideration and purpose aforesaid, whereby the said writing was and is wholly void in law ; and this defendant is ready to verify, wherefore he prays judgment, &c.

There were several other special pleas of the same description. Replication, *pr. non.* because the said writing obligatory in the said declaration sued, was made by defendant, for a good and legal consideration, and not in pursuance of or upon the said illegal and corrupt contracts, or for the purposes in those pleas respectively mentioned, *modo et forma*, &c.

The execution of the bond being proved, the defendant's counsel proposed to give evidence in support of the special pleas. But

Lord ELLENBOROUGH expressed a strong opinion that they were bad in point of law, for which reason there could be no use in trying whether they had any foundation in fact. 1814.

MORTIMER
v.
SALKELD

Garrow A. G. for the defendant, contended, that lottery tickets were "public securities" within the meaning of the stock-jobbing act, 7 Geo. 2. c. 8. s. 1., and therefore that "all wagers, and contracts in the nature of wagers, relating to the price or value of such securities, are null and void to all intents and purposes whatsoever."

Lord ELLENBOROUGH having referred to the statute, continued clearly of opinion, that a wager respecting the profits to be made by the contractors for the lottery could not be brought within its provisions.

The plaintiff had a verdict, which was acquiesced in.

Park and Lawes for the plaintiff.

Garrow A. G. and *Marryat* for the defendant.

[46]

SUGARS v. BRINKWORTH.

Tuesday,
July 5.

THIS was an action against the maker of a promissory note for 340*l.* payable to the plaintiff two months after date.

The defendant having been convicted before magistrates of penalties for running salt, to the amount of 340*l.*, one-half of which went to the informer, and the other half to the crown, a warrant was directed to the plaintiff, a supervisor of excise, to levy the money on the defendant's goods. The defendant thereupon gave the plaintiff the promissory note in question. The him a promissory note at two months for the amount, without previous authority from his superiors : Held, that the promissory note so given was a valid security.

Upon a conviction before magistrates for a breach of the excise laws, a warrant to levy the penalties is directed to an excise officer, who, by way of indulgence to the party, takes from

1814.

plaintiff had no previous authority for taking it ; but his conduct was afterwards approved of by his superiors.

SUGARS
v.
BRINK-
WORTH.

Scarlett, for the defendant, contended, that as between these parties, there was no legal consideration for the note. The plaintiff was a mere stranger ; and it was his duty to have levied the penalties instead of taking any security. Great abuses might follow if such a proceeding were to be sanctioned.

[47] Lord ELLENBOROUGH. If there were any reason to think the law had been abused by the plaintiff, he would not be allowed to enforce payment of the security which he took

for the sum to be levied. But he appears to have acted with perfect good faith; and the defendant, instead of being the subject of extortion or violence, had a benefit conferred upon him. He gave the promissory note at two months in redemption of his goods, which were liable to be instantly sold for what they might fetch. This surely was sufficient consideration. I do not think any previous consent by the commissioners of excise, or the magistrates, was necessary to the arrangement. I will look to such a transaction with extreme jealousy; but the party to whom indulgence has been laudably extended is not to evade his engagements by attempting to criminate his benefactor.

The plaintiff took a verdict for 240*l.*, the sum to which the penalties had been mitigated.

The Attorney-General, Park and Walton, for the plaintiff.

Scarlett for the defendant.

[Attorneys, Maynw and Poole.]

Vide *Pilkington v. Green*, 2 Bos. & Pul. 151

1814.

REX v. DAVIS.

Saturday,
July 9.

THIS was an indictment on 49 Geo. 3. c. 123. s. 35. for receiving prize money under orders from seamen, without being duly licensed for that purpose.

A licensee from the treasurer of the navy was granted to the defendant on the 6th of April 1810, which expired the 6th of April 1813, and was not renewed. In the year 1812 several seamen granted orders to the defendant to receive prize money due to them for the capture of the *Isle of Bourbon*. Money was advanced by him upon them at the time, and they were afterwards lodged as a security with one *Probert*. On the 28th September 1813, the defendant received payment of these orders, being then unlicensed.

The Attorney-General insisted that this offence came within the express words and meaning of the statute. But

Lord ELLENBOROUGH said, I think this case does not come within the act. That was made to prevent unlicensed persons taking an authority to receive wages and prize money due to seamen and marines. The clause in question recites that "it had frequently happened that frauds had been practised upon petty officers, &c. by persons of bad character who had been authorized by them to receive wages, &c. to which they were entitled." But the defendant bore the character of a licensed agent at the time the orders were given to him. Therefore, I cannot think he was guilty of the offence meant to be created, by receiving payment of them when his licence had expired. Where such orders have been granted to a person regularly invested with the character of a licensed prize agent, who *bonâ fide* advances money upon them, it could not be intended that they should become nullities by the expiration of the licence, and that receiving payment of them afterwards should be an indictable offence.

[49]

Not guilty.

Garrow A. G., Park, Jervis, and Peake, for the prosecution.

The defendant had no counsel.

A person
who while
regularly
licensed as
a prize
agent re-
ceived or-
ders for
prize mo-
ney from
seamen, is
not guilty
of an of-
fence with-
in 49 Geo. 3.
c. 123. s. 35.
by receiv-
ing pay-
ment of
these orders
after his
licence has
expired.

1814.

ADJOURNED Sittings at Guildhall.

Thursday,
*July 21.***Moxon and Others v. Pulling and Others.**

B. being liable to A. upon a bill of exchange, accepted by him for the accommodation of C. promises A. to indorse another bill in lieu of this, which was to be drawn by D. upon E. and delivered by C. to A.—C. delivers

A. a bill drawn by D. upon E. and purporting to be indorsed by B. and A. delivers up the former bill.—In an action at the suit

[51]
of A. against B. on the substituted bill, the latter is not precluded from shewing that the indorsement is a forgery.

THIS was an action against the defendants as indorsers of a bill of exchange for 500*l.* drawn by *P. Macdougal*, payable to his own order, accepted by *Hallet and Co.*

The plaintiffs were holders of another bill for the same amount, accepted by the defendants. On the 19th of *July* 1813, being called upon to pay it, they said they had lent that bill to *J. D. May*, who had promised to provide them with funds to meet it and they should call upon him to comply with his engagement. The plaintiff's agent then saw *May*, who proposed that they should take the acceptance of *Hallet and Co.* in payment. This was agreed to, on condition that the defendants indorsed it, and *May* promised to procure their indorsement. The proposed arrangement was then mentioned by the agent to the defendants, who agreed to it, and one of them said he would go and indorse the bill. On 23d *July* the plaintiffs received from *May* the bill in question, purporting to be indorsed by the defendants, and the next day the former bill was delivered up to him. The indorsement was not the handwriting of the defendants, but turned out to be a forgery.

It was nevertheless contended that they were liable as indorsers, on the ground that the indorsement under these circumstances must be taken to have been made with their authority.

Lord ELLENBOROUGH.—You cannot establish any agency to indorse the bill. When the promise was given, the bill does not appear to have existed, and all was *in fieri*. The

defendants might have repented, and refused to indorse. 1814.
They may be liable for a breach of promise; but they cannot
be sued as indorsers of the bill.

MOXON
v.
PULLING.

Plaintiff nonsuited.

Park and Richardson for the plaintiffs.

Garrow A.G. and F. Pollock for the defendants.

[Attorneys, *Witch and Wilde*.]

Vide *Jenys v. Fawler*, Str. 946. *Price v. Heale*, Burr. 1354.

GREENWAY and others v. HINDLEY, (sued with GREGORIE, [52]
outlawed in the suit.)

THIS was an action by the indorsees against the drawers of the following bill of exchange:

"Charlestown, South Carolina,
Dec. 6. 1811.

"Sixty days after sight of this third bill of exchange,
(first, second, and fourth of the same tenor and date un-
paid,) pay Mr. Job Wragg, in London, or order, the sum of
\$700 sterling, for value received.

"Messrs. James Hamilton
"and Co. Glasgow."

A promise to pay a foreign bill of exchange made after it is due, is evidence to support the allegations in the declaration of a due presentation for payment of a protest, and of regular notice to the defendant.

The declaration, after stating the drawing and indorsing of the bill, alledged, that "the said Messrs. James Hamilton and Co. did not nor would, within sixty days after sight of the said bill, or at any time before or after, pay the said sum of money in the said bill specified, or any part thereof, or the said first, second, or fourth of the same tenor and date; although sixty days after sight, to wit, on the 1st day of

1814. " *May* 1811, at &c. aforesaid, the said Messrs. *James Hamilton* and Co. were duly called upon and requested to pay the same according to the usage and custom of merchants, and according to the tenor and effect of the said bill, and the said indorsement so made thereon as aforesaid; but that the [53] said Messrs. *James Hamilton* and Co. did not nor would then, or at any other time, pay the same, or any part thereof, but wholly refused and neglected so to do, and the said bill was then and there duly protested for non-payment thereof."

A witness stated, that on the 23d of *July* 1813, the defendant *Hindley* called at the plaintiff's counting-house in *Manchester*, saying he had come to arrange the payment of a bill for £700 drawn upon a house at *Glasgow*; the bill declared upon was then shewn to him; he said " it was regular; it was due from him and his partner; and he was come to make an arrangement for the payment of the bill, with interest from the time it became due." The plaintiff's here rested their case.

Littledale, for the defendant, contended that this evidence did not support the averments in the declaration, framed as they were respecting the dishonour of the bill, and the protest. But

Lord *ELLENBOROUGH* considered that the defendant's acknowledgment was a sufficient foundation from which the jury might infer the facts stated in the declaration, which appeared very properly framed to meet a case of this sort; and

The plaintiff's had a verdict.

[54] *Garrow A. G., Scarlett, and Campbell* for the plaintiff's.

Littledale for the defendant.

[Attorneys, *Hard and Lowe.*]

Vide *Lundie v. Robertson*, 7 East, 231. *Potter v. Rayworth*, 13 East, 417. *Gibbon v. Coggon*, 2 Campb. 188. *

1814.

MAGALHAENS v. BUSHER.

THIS was a similar action to that of *Sanderson v. Busher*, tried before *Gibbs*, C. J. at the C. P. Sittings after last Easter term (*a*), for breach of an undertaking contained in a

In an action against the owner of a ship for breach of an undertaking to sail with convoy, it is a sufficient defence to shew that the ship was delayed in taking on board the plaintiff's goods, and that after receiving them, the master having made every practicable exertion to join the convoy with which he ought to have sailed, but without effect, proceeded on his voyage without convoy.

(*a*) *Sanderson and others v. Busher*, C. P. Sittings after E. T.
1814.

This was an action against the defendant as owner of a ship called the *Jane*, for breach of a promise to sail with convoy on a voyage from *Oporto* to *London*, whereby the plaintiffs, who had insured 100 pipes of wine on board her for that voyage, had lost a return of premium to which they would otherwise have been entitled.

The *Jane* being at *Oporto* as a general ship, the plaintiffs' agents shipped on board of her 100 pipes of wine, for which the master signed a bill of lading in the following form, dated 29th October 1812 :

" Shipped, &c. in and upon the good ship called the *Jane*, whereof is master, &c. and now riding at anchor in the river *Douro*, and by God's grace bound for *London* with convoy, to say 100 pipes, &c. and are to be delivered, &c. all and every the dangers, &c. unto order or to assigns, &c."

Gibbs C. J. clearly held, that this bill of lading signed by the captain amounted to an absolute undertaking, by which the defendant as owner was bound, that the ship should sail with convoy. His Lordship mentioned that in *Renquist v. Ditchell*, (*a*) there was not, as had been supposed, an express warranty that the ship should sail with convoy, the broker having merely inserted a clause in the advertisement purporting that the ship would sail with convoy, and that Lord *Kenyon* nevertheless held the owners liable, although there was no evidence of their having authorized or assented to the insertion of this clause. (*b*)

A bill of lading signed by the captain, stating the ship to be bound to the port of destination with convoy, amounts to an undertaking binding on the owner, that the ship shall sail with convoy.

Where there is an undertaking to sail with convoy, it is not a sufficient excuse that the ship was prevented from joining the convoy by the state of the weather.

The first convoy from *Oporto* to *London* was appointed to sail on

(*a*) 3 Esp. 54. *Abbot on Shipp*. 123.

(*b*) Where a ship is advertised to sail with convoy, but the bill of lading contains no such stipulation, it seems still undetermined whether sailing with convoy as any part of the contract. See *Snell v. Marryat*, *Abbott*, 614.

1814.

bill of lading to sail from the river *Douro* to *London* with convoy, whereby the plaintiff had lost a return of premium.

MAGAL-HAENS

n.
BUSHER.
[*56]

* The ship and the voyage were the same as in the former case; but it was now proved that it was from the default of the present plaintiff that the ship had not been able to sail with convoy. He had agreed to load 100 pipes on the *Jane*. In the morning of the 4th of November, the day appointed for the sailing of the convoy, she had completed her cargo, and was ready for sea, except that a number of pipes of the plaintiff's wine had not been put on board. The captain remon-

the 4th of November. Early in the morning of that day, most of the fleet dropped down the river and joined the ship of war lying off the bar. The *Jane* did not leave her moorings till mid-day. If the wind had continued as it then was, she would have come up with the convoy without difficulty, but it became quite calm, and when she had crossed the bar, she found a heavy sea setting in upon the shore, which drove her considerably to the southward. She made every practicable exertion to get up to the commodore in the night, but could not. In the morning she found that the fleet had sailed. She followed, and without overtaking it, arrived safe.

It was contended that under these circumstances the defendant was not liable, as the ship had been prevented from joining convoy by the accidents of navigation, which must be taken to be an exception to the whole of his undertaking.

Gibbs C. J. I think you are bound to show that the ship sailed with convoy so as to entitle the plaintiffs to their return of premium. That, and nothing short of that, will be a defence. If the circumstances were such that the ship in point of law must be taken to have sailed with convoy, although she was not able to obtain sailing instructions (*a*), the action cannot be maintained. But if she is allowed to have sailed without convoy, the calm and the current are no excuse. (*b*)

It was admitted that she could not be said to have sailed with convoy; and the plaintiffs had a verdict.

Best, Serjt. and J. Warren for the plaintiffs.

Vaughan, Serjt. and Campbell for the defendants.

(*a*) *Victoria v. Cleave*, 2 Str. 1250.

(*b*) Vide *Brecknock Canal Navigation v. Prichard*, 6 T. R. 730.

strated repeatedly with the plaintiff's agents upon the delay, but was not able to get the last parcel alongside till mid day. The other ships belonging to the convoy had before dropped down the river. He immediately followed them, and from that time used every effort to join the commodore. Had the wind continued, he would have succeeded, but it fell calm, and all his endeavours failed in the manner before described.

1814.

MAGAL-
HAENS
v.
BUSHER.

Garrow A. G., for the plaintiff, nevertheless contended, that he was entitled to recover, as the defendant had entered into an absolute engagement to sail with convoy; and if the ship was prevented from sailing with that of the 4th of November, she might have waited for the next. The plaintiff might be liable to a cross action for delaying the ship, but was now entitled to recover the amount of the premium he had lost by the defendant's breach of contract.

Lord ELLENBOROUGH. I am of opinion that if the captain did all he could to join the convoy, which sailed on the 4th of November, and that was rendered impracticable by the default of the plaintiff or his agent, this action cannot be maintained.

The jury found for the defendant.

Garrow A. G., Park, and Taddy, for the plaintiff.

[58]

Scarlett and Campbell for the defendant.

[Attornies, *Keye and Blunt.*]

1814.

Saturday, July 23. HABBERTON and Another, Assignees of GREAVES, a Bankrupt, v. WAKEFIELD.

The validity of an execution under *a. f. fa.* cannot be impeached at nisi prius on the ground that the judgment ought to have been revived by *scire facias*, or that there was an irregularity in the return of the writ.

MONEY had and received to recover the proceeds of goods of the bankrupt sold under an execution at the suit of the defendant after an act of bankruptcy.

*Wakefield had obtained his judgment in Easter term 1806. Without any *sci. fa.* he afterwards sued out a *fi. fa.* tested 17th June, 52 Geo. 3. returnable Monday next after the morrow of the Ascension. This writ was delivered to the Sheriff on the 24th of January 1813. On the 26th of the same month the goods were seized, and a man continued in possession till they were sold. An act of bankruptcy was committed on the 30th, and the commission issued a few days after.*

[59] Garrow A. G., for the plaintiffs, insisted that the execution could not be supported : 1st, because the defendant was not justified in suing out the writ, without having previously revived the judgment by *scire facias*; and 2dly, because a writ tested the 17th June, 52 Geo. 3. (which was the last day of Trinity term 1802,) and returnable Monday next after the morrow of the Ascension, (which must necessarily be taken to be the last return of Easter term in the following year,) was a nullity.

Lord ELLENBOROUGH.—I will not here try a question of practice. There is no statute imposing the necessity of reviving a judgment by *scire facias* before taking out execution; and the writ, though it may be irregular on account of the distance of time between the teste and return, certainly is not absolutely void. You should have applied to the Court to set aside the proceedings. As you have not, I must here consider the execution to be valid; and as the goods were

seized before the act of bankruptcy, the action cannot be maintained. 1814.

Garrow A. G. and *Scarlett* for the plaintiffs.

Nonsuit.

HABBER-
TON
v.
WAKE-
FIELD.

Park, Topping, and Marryat, for the defendant.

[Attornies, *Luckett* and *Crowder*.]

1814.

ADJOURNED SITTINGS AT GUILDHALL.

*Before Michaelmas Term, 55 Geo. III.**Thursday,
Nov. 3.***MANN v. FORRESTER and Another.**

Insurance brokers who have effected a policy without notice that it is not on account of the person from whom they receive the order, have a lien upon it for their general balance due from him, and have a right to apply to the satisfaction of that balance money received upon the policy as well after as before notice that it belongs to a third

[61]
person; but if they pay the over-plus received after such notice to the agent, the amount may still be recovered from them in an action for money had and received by the principal.

MONEY had and received.

In June 1810, the plaintiff, carrying on business as a merchant at *Rostock*, ordered *White and Lubbern*, merchants in *London*, who afterwards became bankrupt, to send him a cargo of colonial produce on his separate account. They did so, and employed the defendants, their insurance brokers, to effect a policy on the cargo, without mentioning to whom it belonged. The defendants effected the policy accordingly, and debited *White and Lubbern* with the premiums. A loss happened. The policy was allowed to remain in the defendants' hands, and before they had notice of the plaintiff's interest, they had received 650*l.* from the underwriters, and they received 200*l.* afterwards. When they had the notice, they were creditors of *White and Lubbern* to the amount of 167*l.* This sum they deducted from the 200*l.* subsequently received, and the balance of 33*l.* they paid over to *White and Lubbern*'s assignees.

It was allowed that the plaintiff could not recover any part of the money received by the defendants before the notice; but it was insisted that he was entitled to the full sum of 200*l.* received afterwards;—while the defendants contended that the action could not be maintained, as there was no privity between them and the plaintiff, they having had no notice of his interest when they effected the policy, and under these circumstances they had a right to adjust the account with the assignees of *White and Lubbern*, by whom they had been employed.

Lord ELLENBOROUGH.—The defendants having had no notice that this policy was not for *White and Lubbern*, they had a lien upon it for their general balance. They must be supposed to have made advances on the credit of the policy, which was allowed to remain in their hands. Therefore, they had a right to satisfy their general balance from the money received under the policy, whether before or after the notice communicated to them of the plaintiff's interest. But after that notice, I think the excess beyond the satisfaction of their balance, was money had and received by them to the plaintiff's use. It appears to me therefore that the plaintiff is entitled to a

1814.

MANN
v.
FORRES-
TER.

Verdict for 33*l.**Park and Marryat* for the plaintiff.

[62]

Garrow A. G. and Gaselee for the defendant.[Attorneys, *Crowder and Gregson.*]

Vide *Mauns v. Henderson*, 1 East, 335. *Snook v. Davidson*, 2 Campb. 218. *Lanyon v. Blanchard*, ib. 597.

WARWICK v. SCOTT.

Thursday,
Nov. 3.

THIS was an action on a policy of insurance, subscribed by the members of an insurance club, called "The British Association," on the ship *Pomona*, from 15th February 1813 to 15th February 1814.

On the back of the policy were a number of rules and regulations, which were declared to govern all insurances by the club. Amongst these was the following,—upon the construction of which the present case turned :

place of rendezvous for convoy for the voyage; although there be convoy for ships on other destinations between the loading port and place of rendezvous.

Where there is a warranty in a policy of insurance, that the ship shall sail with convoy, she may sail without convoy from her loading port to the

1814.

WARWICK
v.
SCOTT.

[63]

XIX. That during war between this country and *America*, ships will not be insured against enemy risk, when sailing to or from the *West Indies*, *South America*, or any of the *British* settlements in *North America*, across the *Atlantic*, or to or from any island in the *Atlantic*, or in the *Mediterranean Seas*, unless they sail with convoy, but not to be liable to the capture of other ships whilst so uninsured. But ships to be allowed to sail from their loading-port direct to a place of rendezvous to join convoy, on condition that in case of capture, so sailing, a deduction of 15*l.* per cent. be made from the sum insured, or the loss sustained.

On the 26th of *March* 1813, the *Pomona* sailed from the river *Thames*, bound for *Malta*. It was the intention of the captain to have run direct without convoy to *Portsmouth*, and there to have joined convoy, that being the place of rendezvous for *Mediterranean* convoys; but when he reached the *Downs*, the wind was adverse, and he was obliged to come to an anchor. Soon after, three of his men were pressed, and he went ashore to try to get them released. While so employed, the wind came round, and a king's lugger called the *Speculator*, lying in the *Downs* for the purpose of convoying the trade round to *Portsmouth*, made a signal for sailing. The captain of the *Pomona* immediately went on board and sailed after the *Speculator*, which was a little way a-head of him. He received no sailing instructions, and did not apply for them. He soon lost sight of the convoy in a fog, and was captured near *Beachey Head*, by a *French* privateer.

[64]

Garrow A. G. for the defendant, contended that by the 19th regulation of this association, the *Pomona* was bound to have sailed with convoy from the *Downs*, which of course she had not done, having had no sailing instructions. In former wars, there was only convoy appointed from *Portsmouth* for the outward voyage, and none to carry the ship from her loading-port to the place of general rendezvous. Therefore, it had been held that she might proceed thither without convoy, although bound to sail with convoy for the voyage. But of late years the passage from the *Downs* to *Portsmouth* had been found extremely dangerous, and convoys were regu-

larly appointed to carry round both coasters and ships with an ulterior destination. Under these circumstances the convoy from the *Downs* must be considered part of the convoy for the foreign voyage. The *Downs* became the place of rendezvous.

1814.

 WARWICK
v.
SCOTT.

Lord ELLENBOROUGH.—I think the ship was not bound to sail under convoy of the *Speculator*. Sailing with convoy has always been understood to mean—sailing with the convoy that is appointed for the voyage insured; and we have no proof of any new usage to authorize us to adopt a different construction. The *Speculator* here never was considered as the convoy with which the *Pomona* was to sail. To join *that* she was proceeding to *Portsmouth*, the general place of rendezvous. Had the weather permitted, she might have proceeded thither direct, without bringing up in the *Downs* at all. The question therefore seems to me to be, whether she did sail *direct* to *Portsmouth*; that is to say, with all reasonable expedition, according to the course of navigation; or whether she was not unnecessarily delayed by the captain going a-shore in quest of his men. As to this point, His Lordship said, if the men were necessary for the safe navigation of *the* ship, the delay was *ex justâ causâ*, but, otherwise, if the ship might have sailed sooner on the change of wind had the captain been on board, the underwriters were discharged.

[65]

The plaintiff had a verdict.

Scarlett, Taddy, and Campbell, for the plaintiff.

Garrow A. G. and *Park* for the defendant.

[*Attornies, Karsen and Alliston.*]

Vide Lethulier's Salk. 443. *Gordon v. Morley*, Str. 1265.,

C A S E S

ARGUED AND DECIDED

AT

NISI PRIUS

IN

THE COURT OF KING'S BENCH,

At the Sittings after

Michaelmas Term,

In the Fifty-fifth Year of GEORGE III. 1814.

FIRST SITTINGS AFTER TERM AT GUILDHALL.

Wednesday,
Nov. 30.

HOOPER and Another v. LUSBY and Others.

Although one part owner of a ship has no implied authority, as such, to order insurances to be effected on account of the other part owners; yet if

THIS was an action by insurance brokers in London to recover the premiums and commission upon the effecting of several policies of insurance for the defendants, merchants at Great Grimsby.

It was proved that the defendants were members of a commercial company, which carried on business under the firm of Garniss, Corden, Burringham, and Co., and that the policies they be in partnership together, an order to insure the ship given by one renders all liable.

in question were effected in consequence of a letter written by one of the defendants, in the name of the firm, ordering insurance to be done "on account of the *company," on two ships, called the *Commerce* and the *Christiana*.

1814.
HOOPER
v.
LUSBY.
[*67]

Park, for the defendant, insisted, on the authority of *French v. Backhouse*, 5 Burr. 2727. that this action could not be maintained. The defendants were part owners of the ships insured, having separate shares in them. Therefore, one had no authority to insure for the others. In the case referred to, it was held that even the person deputed to act as ship's husband could not render the other part owners liable for insurances, without express proof that they had specially directed him to procure the insurances to be done. Here no evidence had been given that the person who wrote the letter was even ship's husband, nor did it appear that the other defendants ever knew that the policies had been effected.

Lord ELLENBOROUGH.—I allow that one part owner, even if he be ship's husband, has no implied authority to insure for the others. But I take the distinction to be between part owners and partners. According to the evidence, the defendants carried on business together in partnership, under the firm of *Garniss, Corden, Burringham, and Co.*, and the insurances were ordered in the name, and on the account of the firm. Had there been any case holding that the defendants, under these circumstances, were not jointly liable, I should have been very much inclined to over-rule it; but the authority referred to is not in point.

[68]

Verdict for the plaintiffs.

Scarlett and Campbell for the plaintiffs.

Park and Burrough for the defendants.

[Attorneys, *Nind and Walton*.]

1814.

ADJOURNED Sittings at Westminster.

*Thursday,
Dec. 1.***SANDOM, Gent. one &c. v. BOURN.**

An attorney cannot maintain an action for preparing a warrant of attorney, unless a bill has been delivered, pursuant to 2 G. 2. c. 23. s. 23.

THIS was an action by an attorney of this court, to recover two guineas, for preparing a warrant of attorney for the defendant.

Some difficulty having arisen in proving the delivery of a bill a month before the commencement of the action, pursuant to 2 Geo. 2. c. 23. s. 23.

It was contended, that in this case the delivery of a bill was unnecessary, as the mere preparing of a warrant of attorney was not business done in any court, and the plaintiff here did not proceed "for the recovery of any fees, charges, or disbursements at law or in equity."

[69]

Lord ELLENBOROUGH.—The preparing of a warrant of attorney is with a view to business to be done in court, and the expence comes under the head of "fees at law." A bill is taxable, containing a charge for preparing a warrant of attorney; and upon the same principle, no action can be brought to recover the expence, till after the expiration of one month from the delivery of the bill.

The jury disbelieved the witness, who swore to the delivery of the bill, and found a verdict for the defendant.

Scarlett for the plaintiff.

Adolphus for the defendant.

[Attorneys, *Sandom* and *Jackson*.]

So a *dedimus potestatum* charged in an attorney's bill subjects it to be taxed, and therefore renders a delivery of the bill necessary a month before action brought. *Ex parte Prickett*, 1 N.R. 266.

1814

HODGKINSON and Another v. FLETCHER.

Monday,
Dec. 5.

THIS was an action to recover the sum of 53*l.* 15*s.* being the value of certain goods supplied by the plaintiffs, who are linen drapers, to the defendant's wife.

The defendant and his wife separated by mutual consent about ten years ago. Since then, he has lived at *Ealing*, and she in *Dean Street, Audley Square*. There was no deed of separation between them, nor did he come under any written agreement to make her an allowance. It did not distinctly appear how much he allowed her at first. She afterwards sued him for a divorce in the ecclesiastical court, and during the pendency of the suit, he paid her 400*l.* a year alimony by order of the court.

The suit was dismissed several years ago, since which time, he has regularly paid her 300*l.* a year by quarterly instalments. He is a merchant, keeping a carriage, and living genteelly. The goods in question were ordered of the defendants by *Mrs. Fletcher*. She was credited in their books, and they sent her in a bill of parcels making her their debtor. She then desired them to apply to her husband. They had not before known of his existence. The goods were allowed to be necessaries suitable to *Mrs. F*'s degree, and her husband's circumstances.

Lord ELLENBOROUGH.—I hold that the defendant's liability depends upon the sufficiency of the allowance he has made to his wife. If that allowance was sufficient, as it was regularly paid during the time when this debt was incurred, I think the defendant is discharged, although it was not settled by deed or writing. But the allowance must be sufficient according to the degree and circumstances of the husband; and this is not proved by the mere acquiescence of the wife. She might be willing to accept a provision wholly inadequate, because she could not get more. If a contrary doctrine were to prevail, the husband would be discharged on proof that he

If husband and wife live separate, and he pays her an adequate allowance for her support, he is not liable to be sued for her debts, although the separation be not by deed, and there be no written agreement between them with respect to the allowance.

The adequacy of the allowance is a question of fact for the jury.

In an action against a husband for necessaries supplied to his [71] wife, where the defence is a separate maintenance, the wife's receipts are no evidence to prove that the allowance has been paid.

1814. paid, and that his wife received from him 40s. a year. To destroy the credit she carries with her for suitable necessaries, he must prove he has paid her an adequate allowance.—
**HODGKIN-
SON
v.
FLETCHER.** The question of adequacy His Lordship left to the jury, who found a

Verdict for the plaintiffs.

During the trial it was proposed to prove the payments of the allowance by the wife's receipts; but Lord *Ellenborough* held they could not be admitted in evidence.

[72] *Garrow A.G.* and *Marryat* for the plaintiffs.

Park and *Abbott* for the defendant.

[Attorneys, *Price* and *Whitcomb*.]

Vide *Todd v. Stokes*, Id. R. 444. *Salk.* 116. *Nurse v. Craig*, 2 N. R. 148. *Rawlins v. Vandyke*, 3 Esp. 250.

*Tuesday,
Dec. 6.*

GIBSON v. INGLIS, Esq.

The London Dock Company are liable for the negligence of their servants in unloading goods, although the Company derive no profit from their labour.

THIS was an action on the case against the *London Dock Company*, for the negligence of their servants in unloading a pipe of wine, whereby it was staved.

It appeared that the company provide men for the discharging of ships in the docks, and that no lumpers, or labourers provided by the owners of the goods to be unloaded, can be employed. The company derive no profit from the labour of the men by whom the vessels are actually discharged. On this ground it was contended, that they are not liable for any negligence of which these men may be guilty. But

[73] *Lord *ELLENBOROUGH* held that from the manner in which they provide the men, they must be considered to undertake

for the safe delivery of the cargo, and that on the principle of *Coggs v. Bernard* (^a) they were liable, although they derived no advantage from the employment of their servants.

1814.

GIBSON
v.
INGLIS.

It was allowed there had been negligence in unloading the pipe of wine in question, and the plaintiff had a verdict.

Park and *Marryat* for the plaintiff.

Garrow A. G. and *Bosanquet* for the defendant.

[Attorneys, *Nind* and *Weston*.]

(^a) *Ld. Raym.* 909.

1814.

ADJOURNED Sittings at Guildhall.

Wednesday,
*Dec. 7.*DOE d. PIT^T v. LAMING, Widow.

Covenant
in a lease
to insure
and keep
[74]
insured a
specified
sum of mo-
ney upon
the pre-
mises. The
lessee
effects such
an insur-
ance, the
policy con-
taining a
memorandum,
that in case of
the death of
the assured,
the policy
might be
continued
to his per-
sonal repre-
sentative,
provided
an indorse-
ment to
that effect
was made
upon it
within
three
months
after his
death. The
lessee dies,
and an indorsement
continuing the policy
to his per-
sonal re-
presenta-

EJECTMENT on the forfeiture of a lease, dated the 21st of July 1812, whereby the lessor of the plaintiff demised to *William Laming*, since deceased, the premises in question, known by the name of *Grigsby's Coffee-house*, in *Threadneedle-street*.

The first covenant alleged to have been broken was, " that " the lessee, his executors, administrators, and assigns, should " and would from time to time, and at all times during the " continuance of the term thereby granted, insure and keep in- " sured, or cause and procure to be kept insured, the sum of " 800*l.* at the least, in some sufficient insurance-office, within " the cities of *London* or *Westminster*, upon the said de- " mised premises."

In point of fact, *William Laming*, the lessee, in his life-time, effected an insurance on the premises for 1200*l.* from the 29th of *September* 1813 to the 29th of *September* 1814. The policy, after reciting the contract and payment of the premium and duty for the first year, declared, " That from the date thereof, " and so long as the said assured should pay or cause to be paid " the said sum at the time therein mentioned, and the said com- " pany should accept the same, the capital stock, funds, and " effects of the said company should stand charged and liable to " pay to the said assured, his heirs, executors, and administra- " tors, the amount of any loss or damage by fire to the property " thereto above mentioned, not exceeding the sum of 1200*l.*"

*W*hile the above was made after the expiration of three months from the time of his decease.--- Held that under these circumstances there was no breach of the covenant to keep the premises insured.

On the back of the policy there was a printed memorandum, stating, that in case of the death of the assured, the policy might be continued to his legal representative, provided an indorsement was made on the policy to that effect, within three months after his death.

1814.

DOED. PITT
v.
LAMING.

William Laming died in the end of the year 1813, leaving the defendant his executrix, and an indorsement was made on the policy, continuing it for her benefit, before the ejectment was served, but more than three months after the death of the testator.

Garrow A. G. for the lessor of the plaintiff contended, that under these circumstances, there was a forfeiture of the lease for a breach of the covenant to insure. The indorsement after the expiration of three months from the death of *William Laming*, could not give validity to the insurance, without a fresh stamp; and at any rate the premises had been uninsured from the expiration of the three months till the indorsement was made.

Lord ELLENBOROUGH.—I do not think the policy became void for want of the indorsement within three months. At most, it was voidable by the Company. The proviso relied upon, is extremely harsh, and I doubt its legality, where the policy, as here, is declared to be for a definite time. If the assured dies within the time, it inures to the benefit of his personal representative. In case of death, there may often be confusion in the affairs of the assured to prevent any application to indorse the policy within three months. He may die intestate, leaving infant children; or having named as executor a person living in the *East Indies*. Under such circumstances, to deprive the family of the benefit of the policy would be monstrous injustice. I doubt whether this proviso can have any such operation; but I think it had much better be omitted, or placed in a conspicuous part of the policy, that every one may see the nature of the security he will obtain by the insurance. (a)

[76]

(a) Vide *Doe d. Pitt v. Shewin*, 3 Campb. 134.

1814. It was then insisted that the policy was void, as it enumerates several trades which are considered as double hazardous,

*Do Ed. Pitt v.
Laming.*

A coffee-house is not an inn, within the meaning of a policy of insurance against fire, enumerating the trade of an inn.

LAMING. where any of these are carried on, unless a premium be paid in proportion. Among these trades, is that of an inn-keeper. Now *Grigsby's* coffee-house must be considered an inn. People from the country lodge there as in an inn. And as the premium paid on this insurance was the usual premium on common risks, the policy was void, and the premises had not been insured.

[77] keeper, with others, as double hazardous.

Lord ELLENBOROUGH.—*Grigsby's* coffee-house I happen to know is like any other coffee-house in the metropolis; and I think a coffee-house is not an inn within the meaning of the policy. Horses, waggons, and coaches come to an inn; there are stables and outhouses attached to it; people are going to these with lights at all hours; hence there is an increased danger of fire, and the trade of an innkeeper is considered double hazardous. But the trade of a coffee-house keeper is of a very different description.

Letting lodgings is not a breach of a covenant in a lease not to underlet any part of the premises without the licence of the lessor.

It was lastly contended, that the lease had been forfeited by a part of the premises being underlet, contrary to the following covenant :

" That the said *William Laming*, his executors or administrators, should not nor would at any time or times thereafter during the continuance of the term, grant any underlease or leases for any term or terms whatsoever, or let, as sign, transfer, set over, or otherwise part with the said messuage or tenement and premises, or his or their term or interest by the said indenture granted, or intended so to be, or any part thereof, without the special licence, assent, and approbation of the said *S. Pitt*, his heirs or assigns, under his or their hands in writing first obtained."

Evidence was given that a clerk in the post-office had [78] lodged above a twelvemonth in a room in *Grigsby's* coffee-house, of which he had the exclusive possession.

Lord ELLENBOROUGH.—The covenant can only extend to such underletting as a licence might be expected to be applied for; and whoever heard of a licence from a landlord to take in a lodger? (a) 1814.
Doxd. Pitt
v.
LAMING.

Nonsuit.

Garrow A. G. and **Littledale** for the lessee of the plaintiff.

Park and **Andrews** for the defendant.

[Attornies, *Shepherd* and *Cocker.*]

(a) Vide *Duc d. Holland v. Worsley*, 1 Campb. 20.

BASS v. CLIVE.

Thursday,
Dec. 8.

THIS was an action by the indorsee against the acceptor of a bill of exchange.

The first count of the declaration stated, that "certain persons trading under the firm of *Ellis Needham jun. and Co.*," drew the bill payable to their own order, and indorsed it to the plaintiff. The second count alledged that "the said *Ellis Needham jun. and Co.*" drew and indorsed the bill.

The bill on the face of it professed to be drawn and indorsed by "*Ellis Needham jun. and Co.*"; but the plaintiff's witness swore that *Ellis Needham jun.*, the drawer of the bill, trades singly under that firm, and that he has no partner connected with him in business.

The objection being taken by *E. Lawes* for the defendant, Lord *Ellenborough* inclined to think this a fatal mis-description of the bill in both counts, and directed a nonsuit, with leave to move to set it aside.

If a bill of exchange purports to be drawn by a firm consisting of several persons, in an action by the [79] indorsee against the acceptor, the declaration may aver that certain persons using that firm drew the bill, although in point of fact the firm consisted of a single individual.

1814.

*Bass v.
Clive.*

An application for this purpose was accordingly made to the Court, and a new trial was granted, the judges all agreeing that the defendant, by accepting the bill, was estopped from taking the objection.

At the sittings in *Easter Term* following, the cause was again tried, and the plaintiff obtained a verdict.

Topping, J. Williams, and Campbell, for the plaintiff.

E. Lawes for the defendant.

[*Attorneys, Hurd and Tomlinson.*]

Vide *Wilkinson v. Lutwidge*, Str. 648. *Price v. Neale*, Burr. 1354. *Taylor v. Croker*, 4 Esp. 187.

[80]

*Thursday,
Dec. 8.**PERRY v. BOUCHIER.*

ACTION on the case for running down a ship.

The plaintiff having made out a *prima facie* case,

The defendant called the master of his vessel for the purpose of shewing that she had been properly navigated ;—and handed a release to him.—This, upon inspection, appeared to be a release, not only to the master, but to three others, who formed the crew of the defendant's vessel, and it had only one stamp.

Garrow A. G. for the plaintiff, thereupon objected that it ought to have had a stamp for each individual to whom it was given, and that in its present state it was inoperative

Lord ELLENBOROUGH.—I entertain doubts upon the point; but I shall rule that the release is at all events sufficient to

render competent the master of the vessel, who is the first person named in it. Perhaps as the crew, if liable to the owner at all for negligence upon this occasion, are guilty of a joint tort, a joint release to them for that negligence might be sufficient with one stamp. At any rate, I shall give effect to the release, as far as it concerns the person first named in it, and to whom it is first tendered

1814.

PERRY
v.
BOUCHIER.

[81]

The master was accordingly examined.

The plaintiff had a verdict.

Garrow A.G. and Lawes for the plaintiff.

Abbott and Bolland for the defendant.

[Attorneys, *Langham and Pratt.*]

Vide *Powell v. Edmunds*, 12 East, 6. *Emmerson v. Heclis*, 2 Taunt. 38. *Davis v. Williams*, 13 East, 232. *Doe d. Copley v. Day*, 13 East, 241.

SILLS and Others v. LAING.

Thursday,
Dec. 8.

THIS was an action for money paid.

The plaintiffs are wharfingers. Some months ago, a quantity of canvas came to their wharf consigned to a person of the name of *Fletcher*. By mistake, it was carried away by the defendant, who had cut it up into sails before he discovered that it was not intended for him. The plaintiff's were then called upon by *Fletcher*, and obliged to pay him the value of the canvas,—the amount of which they now sought to recover from the defendant.

discovers the mistake: Held that the wharfinger after paying *A.* the value of the goods, could not maintain an action against *B.* for money paid, to recover the amount.

Goods come to a wharfinger's consigned to *A.*—*B.* believing them to be meant for himself, carries them from the wharf, and uses them before he [82]

1814.

SILLS
v.
LAING.

Garrow A.G. for the plaintiffs contended, that they might waive the tort committed by the defendant in carrying away the canvas from their wharf, and that the law would raise a promise on his part to repay to them the money which they had been compelled to pay by his default. But

Lord ELLENBOROUGH held that the plaintiff's ought to have declared specially, and directed a

Nonsuit.

Garrow A.G. and *Spankie* for the plaintiffs.

Park and *Littledale* for the defendants.

[Attorneys, *Falcon* and *Evans.*]

Vide *Brown v. Hodgson*, 4 Taunt. 189.

[83]

Friday,
Dec. 9.

GRANGER v. WORMS.

Where
household
premises
are sold by
auction,
and the
lease con-
taining the
usual cove-
nant to
repair is
produced
and read to
the bidders,
if any of
the build-
ings de-
mised and
described
in the
lease have
been pulled
down be-
fore the

THIS was an action to recover back a deposit of 10*l.* paid by the plaintiff to the defendant on t lease of a house and premises at *Wapping*.

Amongst the subjects demised was a summer-house. This summer-house existed at the time the lease was granted, but had been pulled down before the sale to the plaintiff. The particulars of sale did not describe the summer house; but the lease was produced and read at the auction. The lease contained a covenant to deliver up the demised premises in good repair at the end of the term. It was proved that it would cost about 25*l.* to rebuild the summer-house. The plaintiff had agreed to pay 80*l.* for the lease. The rent of the premises was 20*l.* a year.

sale, the purchaser is not bound to complete the purchase, and may recover back his deposit, although the building pulled down be not described in the particulars of sale.

Lord ELLENBOROUGH.—The plaintiff had a right to expect to find the summer-house described and demised by the lease. As that no longer exists, the consideration fails on which he paid the deposit, and he has a right to recover it back.

1814.

 GRANGER
 v.
 WORMS.

Garrow A.G. and *Adolphus* for the plaintiff.

Park and *Curwood* for the defendant.

[*Attorneys, Paulin and Foy.*]

 [84]

MOIR v. ROYAL EXCHANGE ASSURANCE COMPANY.

Saturday,
Dec. 10.

THIS was an action on a policy of insurance dated the 21st *September*, 1811, on the ship *Neptunus*, "at and from *Memel* to the ship's port of discharge in *England*,—free of capture and seizure, and the consequences of any attempt thereof, in the port and roads of loading,—*warranted to depart on or before the 15th of September*,—to return 3*l. per cent.* if the ship departed on or before the 1st of *September*, and arrived."

Held that where a ship insured is warranted to depart on or before a given day, she must actually be out of her port of departure on that day, and that it is not enough that she broke ground and commenced the homeward voyage, so as to have satisfied a warranty to sail on that day.

On the 31st of *August*, 1811, the *Neptunus* had completed her homeward cargo in the port of *Memel*, and on the 9th of *September* following she was cleared out at the custom-house there, and ready to proceed on her voyage. At the mouth of the port of *Memel* there is a bar, which all ships loading there have to pass previous to their getting to sea. On the 9th of *September* the wind was fair for leaving the port, and proceeding to *England*; and the *Neptunus* hove up her anchor for that purpose. She sailed about a mile from the place where she had lain at anchor; but, upon approaching the bar, the wind changed, and it was found impracticable for her to leave the port. She accordingly again came to an anchor within-side the bar. The wind continued adverse to ships passing the bar till the 21st of *September*. During that

1814.

**MOIR
v.
ROYAL EX-
CHANGE
ASSURANCE
COMPANY.**

time the *Neptunus* lay at anchor within the port of *Memel*, but in perfect readiness to proceed to sea had the wind been favourable. On the 21st she actually sailed out of the port on her voyage to *England*, in the course of which she was totally lost.

Topping for the plaintiff relied upon *Bond v. Nutt*, Cowl. 601. *Thelluson v Fergusson*, Doug. 346. and *Wright v. Shiffner*, 11 East, 515. 2 Campb. 247. These cases are conclusive to shew, that if the warranty had been to *sail* on or before the 15th of *September*, the plaintiff would have been entitled to recover; and it is impossible to affix a different meaning to the word "depart." The ship did depart within the meaning of the policy on the 9th of *September*, when having completed her loading, and being cleared at the custom-house, she got up her anchor with a fair wind to proceed on her voyage, and actually sailed a mile from the place where she was moored, before the wind changed and drove her back.

LORD ELLENBOROUGH.—The authorities cited would have been conclusive, had the warranty been to *sail* on or before the day mentioned in the policy. I think she had *sailed* when she broke ground on the homeward voyage. But a warranty to *depart* appears to me to require a different construction. [86] "Warranted to depart on or before the 15th of *September*," must mean that she should have departed from *Memel* on or before that day. But she remained in the port of *Memel*, and therefore she had not departed from it. The intention of the insurers must have been, that the ship should be out of the port of *Memel*, and at sea by the given day; but she was still in the port, and therefore the warranty was not complied with. Where she lay on the 15th of *September*, the defendants would not have been liable for capture or seizure, or the consequences of any attempt thereof. Why? Because she was in her port of loading. But if she was in her port of loading, could she have departed from it? I am clear that as she was not out of the port by the stipulated time, she had not *departed* within the meaning of the warranty.

Plaintiff nonsuited.

In the ensuing term the Court of K. B. refused a rule to shew cause why the nonsuit should not be set aside.

1814.

MOIR
v.
ROYAL EX-
CHANGE
ASSURANCE
COMPANY.

Topping, Marshall, Serjeant, and Abbott, for the plaintiff.

Garrow A. G., Park, and Bosanquet, Serjeant, for the defendants.

[Attornies, *Allan and Kaye*.]

Another action was commenced on the same policy, in the Court of C.P. which came on for trial at the Guildhall Sittings after Hilary Term, before Gibbs, C.J. who, without expressing any opinion himself, permitted a verdict to be taken for the plaintiff, subject to the opinion of the court, upon a case reserved.

[87]

ROSHER and Another v. KIERAN.

Monday,
Dec. 12.

THIS was an action by the plaintiffs, as indorsees, against the defendant, as drawer of a bill of exchange for 1000*l.* dated *Dundalk*, 26th of *February*, 1814, payable to the order of the drawer at ninety days after date, and accepted by *Thomas Rowcroft*, at *Smith, Payne and Smith's*, bankers, in *London*.

The question was, whether the defendant had received due notice of the dishonour of the bill.

The bill became due on the 30th of *May*, when it was presented for payment, and dishonoured. On the same day, the acceptor wrote a letter to the drawer, stating that he had not been able to pay it, and that it was then in the hands of the plaintiffs.

In an action by the indorsee against the drawer of a bill of exchange, it is sufficient to prove that the defendant had notice of the dishonour of the bill from the acceptor.

1814.

Lord ELLENBOROUGH held this notice from the acceptor sufficient, and

**ROSHER
v.
KIERAN.**

The plaintiffs had a verdict.

Garrow A. G. and Gurney for the plaintiffs.

Nolan for the defendant.

[Attorneys, *Pearson and Parsmore.*]

Vide *Nicholson v. Gouthit*, 2 H. Bl. 609. *Esdaile v. Sowerby*, 11 East, 114. *Stewart v. Kennett*, 2 Campb. 177.

*Monday,
Dec. 12.*

HAUGHTON v. EWBANK.

In an action on a policy of insurance, subscribed by the defendant's agent under a power of attorney, it is sufficient proof of the agency, that the defendant is in the habit

[89]
of paying losses upon policies so subscribed by the agent in his name, without producing the power of attorney.

THIS was an action on a policy of insurance, which purported to be subscribed for the defendant by *William Little* as his agent.

Little being called to prove the agency, stated that he had authority to subscribe policies for the defendant, by a power of attorney, which was not produced; but added that the defendant had been in the habit of paying losses upon policies which the witness had subscribed in his name.

Bayley, for the defendant, objected that the authority, being in writing, ought to be produced.

Lord ELLENBOROUGH, however, held that the agency was sufficiently established by the defendant's general recognition of policies subscribed in the same manner as the present.

The policy was in the common printed form on ship and goods, but contained a written memorandum, stating that the insurance was on goods which were declared and valued. The declaration averred, that the defendant became an assurer of the sum of 200*l.* upon the *premises* in the said policy of insurance mentioned.

Bayley contended that it could only be said that the defendant became an assurer upon the premises mentioned in the policy where he insured both ship and goods. But

Lord ELLENBOROUGH observed, that where there is a written memorandum, declaring the policy to be on goods, the effect is the same as if goods only were mentioned in the policy, and that the word "*premises*" is an apt description of the subject-matter actually insured, whatever that may be.

The plaintiff had a verdict.

Garrow A. G. and Richardson for the plaintiff.

[90]

Bayley for the defendant.

[Attorneys, *Montrouz and Briggs*.]

TEED v. MARTIN and Others.

Tuesday,
Dec. 13.

THIS was an action against the defendants as owners of the ship *Young Roscius*.

To prove that the defendant *Martin* was an owner, the plaintiff's counsel at first relied upon an entry in the register-book from the custom-house in the port of *London*, stating that the certificate had been granted upon an affidavit by *Martin*, swearing that he was an owner. It was admitted

not admissible as secondary evidence of ownership against *A.* although all the affidavits on which registers had been granted were burnt at the custom-house.

1814.

HAUGHTON

v.

EWBANK.

Where a policy in the common printed form on ship and goods contains a written memorandum, declaring the insurance to be on goods, a general averment is proper, that the defendant became an assurer on the *premises* in the policy mentioned.

An entry in the register-book at the custom house stating that a certificate of register was granted on an affidavit by *A.* that he was an owner, held

1814.
TWEED
v.
MARTIN.

that all the affidavits on which registers were granted had been burnt in the late fire at the custom-house ; and it was contended that this entry in the register-book was secondary evidence of the affidavit. But Mr. *Sentance*, who produced the book, had not made the entry, and Lord *Ellenborough* was clearly of opinion it could not be received as evidence, without the clerk who had made the entry.

[91] This clerk being sent for, said he made the entry from the original certificate of registry which he had before him at the time, but he never saw the affidavit. The certificate is written out by the collector's clerk, who always sees the affidavit on which it was granted.

Park, for the plaintiff, insisted that faith was to be given to an entry so made, for the purpose of shewing that *Martin* had sworn himself to be an owner. He allowed that, according to the late decisions, the register *per se* is no evidence of ownership ; but in this case, the register purported to be granted upon *Martin*'s affidavit, and it never could have been granted unless the affidavit had been made by him or some one personating him. But, considering that the registers were granted, and the book was kept by sworn officers, according to the directions of an act of parliament, the Court would presume that the affidavit was sworn by *Martin* himself.

Lord ELLENBOROUGH.—It is allowed that the defendant can only be fixed as owner through the medium of the affidavit. That document cannot be produced, and secondary evidence of its contents is receivable. But the register-book is not sufficient for this purpose. You must call the collector's clerk, or some person who has seen the affidavit, and knows that it was made by the party sought to be charged.

The ownership was proved by other means, and the plaintiff had a verdict.

Park and Marryat for the plaintiff.

1814.

Garrow A. G. and Taddy for the defendant.

TRED
v.
MARTIN.

[Attorneys, *Lamb and Tomlinson.*]

Vide *Strother v. Willan*, ante 24.

CAREY v. ADKINS.

Tuesday,
Dec. 20.

MONEY had and received to recover the sum of 31*l.*

The plaintiff's wife was suspected to have been concerned in committing a burglary in *Baker Street*, in the house of a Mrs. *Simmons*, from which property to the amount of 3000*l.* had been stolen. The defendant, who is one of the police officers at *Bow Street*, went to the house where Mrs. *Carey* was living to apprehend her, and upon that occasion took the money in question, which she had put into the bosom of a child for the purpose of concealment.

A question arose, whether what she said concerning this money, when examined before the magistrate, was evidence for the defendant in the present action, which was brought by her orders.

Lord *ELLENBOROUGH* ruled, that it was.—As the money never appeared to have been in the husband's possession, and as the wife had the exclusive custody and management of it, he must be bound by what she said concerning it.

In such an action, facts being proved to raise a reasonable suspicion that the money taken from the wife was the produce of stolen property, held that evidence was necessary on the part of the plaintiff to shew whence the money was derived, and that the wife was bona fide in possession of it for her husband.

Where an action is brought by the orders of a wife in the name of her husband to recover a sum of money taken from her on the ground that it was the produce of goods she had been concerned in stealing,—what she

[93]
afterwards said in her husband's absence respecting the money, when examined on the charge of being concerned in the robbery, is

evidence for the defendant.

1814.

**CAREY
v.
ADKINS.**

A considerable body of evidence being given to raise a suspicion that Mrs. *Carey* had been concerned in the burglary, and that this sum of money was the produce of the stolen goods,—

Lord **ELLENBOROUGH** said, it was under these circumstances necessary on the part of the plaintiff to shew how the money came into the wife's hands, and that it was *bonâ fide* his property.

No evidence of this sort could be given, and the

Plaintiff was nonsuited.

Topping and Marryat for the plaintiff.

Garrow A. G. and Gurney for the defendant.

[Attorneys, *Woolley* and *Shearman*.]

Vide *Paterson v. Hardacre*, 4 *Taunt.* 114.

[94]

*Monday,
Dec. 19.*

RICHARDSON v. LONDON ASSURANCE COMPANY.

A policy in the common form, upon goods to the East Indies, ceases when the ship has delivered the Company's outward cargo at a port in the East Indies, and will not protect the goods to a market in an intermediate voyage made by the ship before her final departure for Europe.

THIS was an action on a policy of insurance on goods in the *Dover Castle*, East Indiaman, "at and from London to Madeira, the Cape of Good Hope, and all or any of the ports or places in the East Indies, China, Persia, or elsewhere, on this or the other side of the said Cape, until arrived at the last place of discharge on the outward voyage, with leave to exchange the goods in the course of the voyage."

The plaintiff was captain of the *Dover Castle*, on this voyage, and the goods insured were his investment.

The ship arrived at *Bengal* on the 14th *December* 1811, and there discharged the whole of the cargo she carried out for the *East India Company*. She then took in a considerable quantity of salt-petre as ballast for the homeward voyage. About the beginning of *April*; however, she was ordered by the Company, under the usual clause in the charter-party for that purpose, to make an intermediate voyage to *Madras*, and she took in a quantity of rice and other goods for the Company to be conveyed thither. The captain sold a considerable part of his investment at *Calcutta* (having landed the whole); but not finding purchasers there for the residue, he resolved to carry it on to a new market. On the 24th *May* the ship sailed down the *Hoogly* for *Madras*, and struck on the ground, which occasioned the loss now sought to be recovered.

1814.

RICHARD-
SON
V.
LONDON
ASSURANCE
COMPANY.

[95]

Park, for the plaintiff, contended that the goods insured were protected by the policy, while going to a market in the *East Indies*. As to them, the outward voyage did not terminate till they were disposed of. The Company's officers could not cover their outward investments, if a different construction should prevail. These intermediate voyages were extremely common, and it was usual to carry private investments from place to place for a market till the ship took her final departure for Europe.

Lord ELLENBOROUGH.—The question is, whether the loss happened before ship arrived “at the last place of discharge “on the outward voyage.” I think the outward voyage terminated where all the Company's outward cargo was discharged. If the outward voyage still continued when saltpetre had been taken in as ballast for the homeward voyage, and a quantity of rice and other goods to be carried on an intermediate voyage, where shall be the dividing point? If the Company's officers wish for the protection which is here sought, they must not limit the risk to the duration of the outward voyage, but extend it to the arrival of the goods to a market at their final port of discharge.

[96]

Plaintiff nonsuited.

1814.

Park and Marryat for the plaintiff.

RICHARD-
SON
v.
LONDON
ASSURANCE
COMPANY.

Garrow A. G. Moore, and Richardson for the defendants.[Attornies, *Sudlow and Bleasdale.*]Monday,
Dec. 19.

COHEN v. PAGET.

By the usage of trade in London, a broker who acts as such in chartering a ship to the Baltic is entitled to a commission of 5 per cent. upon the amount of the freight

THIS was an action for work and labour as a ship-broker, in which capacity the plaintiff had chartered a ship of the defendant to the Baltic.

The question was, whether the plaintiff was entitled to a commission of 5 per cent., or only of 2½ per cent. upon the amount of the freight, there being no specific agreement upon the subject.

A number of witnesses were called, who swore that upon voyages to the Baltic, the broker who charters the ship for the captain or owner, receives always a commission of 5 per cent., although to the Mediterranean and West Indies sometimes only 2½ is given.

[97]

Lord ELLENBOROUGH left the matter to the special jury, who found that by the usage of trade the plaintiff was entitled to a commission of 5 per cent.

Verdict accordingly.

Topping and Long for the plaintiff.*Garrow A. G. Park, and Marryat*, for the defendant.[Attornies, *Coote, Swan, and Co.*]

1814.

USHER and Another v. WILLIAM DAUNCEY and Others.

Friday,
Dec. 23.

THIS was an action on a bill of exchange for 1574*l.* 18*s.*, dated Plymouth 27th February 1814, drawn by *Daunceys, Cock and Squire*, payable to their own order at six months after date, accepted by *Hullett and Hardie*, and indorsed to the plaintiffs.

The defendants *William Dauncey, William Cock and George Squire*, together with *Frederick Dauncey* now deceased, carried on a partnership at Plymouth, a concern called the *Tamar Brewery*. They had been in the habit, for the purpose of raising money, of drawing bills on *Hullett and Hardie* in London, which were discounted through the medium of *J. D. May*, a bill-broker. These bills were usually drawn and indorsed in blank, and filled up with dates and sums as the urgencies of business required.

The bill in question had been drawn and indorsed in blank by *Frederick Dauncey*, in the partnership firm of *Daunceys, Cock and Co.*, on the 2nd February 1814, and given by him to the clerk, with a number of similar blanks, to be filled up for the use of the partnership. He died on the 15th of March 1814. This bill was not filled up till the 22nd of April following. The clerk of the defendants then inserted the date, the sum, and the names of the other parties, in the counting house of *Hullett and Hardie*, by whom it was accepted. It was placed in the hands of *J. D. May* for the purpose of being discounted. On the 5th of May, the plaintiffs discounted the bill for *J. D. May*, who was stated never to have accounted for the money he received upon it.

Before the bill was filled up, the *Tamar Brewery* had assumed the new firm of *Daunceys and Squire*, and an attempt was made to shew that *Cock* had ceased to be a partner; but

the surviving partners were liable as drawers of the bill to a bona fide indorsee for value, although no part of the value came to their hands.

Where *A.* being member of a [98] partnership consisting of several individuals, drew a bill of exchange in blank in the partnership firm, payable to their order; and having likewise indorsed it in the partnership firm, delivered it to a clerk to be filled up for the use of the partnership, as the exigencies of business might require, according to a course of dealing in other instances; and after *A.*'s death, and the surviving partners had assumed a new firm, the clerk filled up the bill, inserting a date prior [99] to *A.*'s death, and sent it into circulation.

held, that

1814. the only evidence of this was a letter, dated 3d *February* 1814, to *Hullett and Hardie*, desiring them not to accept any bill drawn by *Cock*. The clerk who filled up the bill said, he made use of the old blank because he had not then any in the new firm of *Daunceys and Squire*, and that he understood it was issued for the accommodation of the defendants.

Garrow, A. G. contended that after the death of *Frederick Dauncey*, the blank to which he had affixed the partnership firm became a nullity, on the ground that the power he gave to fill it up as a bill of exchange expired with him. But

Lord Ellenborough said that this case came within the principle of *Russel v. Langstaff*, *Dong.* 513. ; that the power must be considered to emanate from the partnership, not from the individual partner; and that therefore after his death the bill might still be filled up so as to bind the survivors.

The plaintiff had a verdict, which the Court of King's Bench afterwards refused to set aside.

Park, Marryat, and Abbott for the plaintiffs.

[100] *Garrow A. G., Topping, Gifford, and Park* for the defendants.

[*Attorneys, Hackett and Ellis*]

Vide *Pasmore v. North*, 13 East, 517. *Snaith v. Mingay*, 1 M. and S. 87.

1814.

COWIE v. BARBER.

*Saturday,
Dec. 24.*

THIS was an action on a policy of insurance, dated in July 1810, on goods on board the ship *Jane*, at and from her port or ports of loading in the river *Plate* to *London*.

The ship with the goods on board was seized and confiscated by the *Spanish* government at *Buenos Ayres*.

The defence set up was, the illegality of the voyage, which was contrary to 9 Ann. c. 21. establishing the exclusive trade of the *South Sea Company*.

To meet this the plaintiff gave in evidence a prospective licence from the *South Sea Company*, dated in December 1809, to the ship *George Canning*, from the proceeds of whose outward cargo the goods in question were purchased, and a retrospective licence to the *Jane*, dated in September 1810, when, in point of fact, she had been seized and confiscated.

Lord ELLENBOROUGH. Stat. 9 Ann. c 21. § 49. (a) appears clearly to me to render this policy void. The persons

(a) " And to the end the said *South Seas*, or the kingdoms, lands, islands, havens, forts, cities, towns, and places within the limits aforesaid, or any of them, shall not after the said first day of August one thousand seven hundred and eleven be visited, frequented, or haunted by any other of the subjects of her majesty, her heirs or successors, contrary to the true meaning of this act, be it enacted by the authority aforesaid, That if any of the subjects of her majesty, her heirs or successors, of whatever degree or quality soever they be, other than the said company or corporation, or their factors, agents, or servants, or other persons by them licensed thereunto according to the true meaning of this act, shall directly or indirectly visit or frequent, trade, traffic, or adventure into, unto, or from the said *South Seas* or other the parts within the limits aforesaid, contrary

A retrospective licence granted by the S. S. Company is insufficient to legalize a voyage from the South Seas; nor does it make any difference that the goods brought home are the proceeds of the outward cargo of a ship [101] to which, a retrospective licence was regularly granted.

1814.
COWIE
v.
BARBER.

concerned in this voyage of the *Jane* were not the factors, agents, or servants of the *South Sea Company*: therefore, to make the voyage legal, it must appear that they were licensed thereunto. The *George Canning's* licence cannot be drawn in aid. It was granted to the owner of that ship alone, and is not transferable. This brings us to the retrospective licence granted to the *Jane*, and I cannot ascribe to it the effect of legalizing an adventure which had then terminated. The object of the act of parliament appears not merely to have been to guard the monopoly of the *South Sea Company*, but to subject the navigation of those seas to supervision and controul. The jealousy which *Spain* has shewn upon this subject ever since the time of *Raleigh* is well known to all who are in any degree acquainted with the history of the country.—Accordingly, only two fourth parts of the penalties are given to the *South Sea Company*. To say that the retrospective licence could under these circumstances purge the illegality, would be to ascribe to the *South Sea Company* the power of dispensing with a public law, and of remitting penalties that have been actually incurred, and which have vested in the crown and in a common informer. I am ex-

to the true meaning of the said act, or shall hire, freight, or fit out any ship or ships, or lade or put on board any ship or ships any goods or merchandizes whatsoever, with intent to haunt, frequent, traffic, trade, or adventure into, unto, or from the said *South Seas*, or other parts within the limits aforesaid, contrary to the true meaning of this act, every such offender and offenders shall incur the forfeiture and loss of all ships and vessels which shall be employed in such trade, with the guns, tackle, apparel, and furniture thereunto belonging, as also all the goods and merchandizes laden thereupon, and all the proceeds and effects of the same, and also double the value thereof, viz. one fourth part thereof to the use of her majesty, her heirs or successors, one other fourth part thereof to such person or persons as will seize, inform, or sue for the same, and the other two fourth parts thereof to the use of the company or corporation to be erected in pursuance of this act, such forfeiture and penalty to be recovered with full costs of suit in any of her majesty's courts of record in manner as aforesaid."

tremely sorry when the contracts of individuals are thus defeated; but much more mischievous consequences would follow from attempting to make the law bend to what may be considered the justice of individual cases.

1814.
COWIE
v.
BARBER.

Plaintiff nonsuited.

Park, Nolan, and Scarlett for the plaintiff.

Garrow A. G., Jervis, and Richardson, for the defendant.

[Attorneys, *Pasmore and Reardon*.]

Vide *Hobbs v. Hannam*, 3 Campb. 95. *Toulmin v. Anderson*, Taunt. 227. *Hodgson v. Fullarton*, 4 Taunt. 787.

MOORSOM v. PAGE.

THIS was an action on a charter-party, whereby the ship *Lavinia* was let to freight by the plaintiff to the defendant for a voyage from *Rio de la Plata* to *London*, the plaintiff covenanted to "receive and take on board the said ship, a full and complete cargo, consisting of copper, tallow, and hides, or other goods, but not more than 50 tons of copper and tallow, nor more than 15 of such 50 tons to consist of copper," and the defendant undertook to furnish and provide for loading "on board the said ship a full and complete cargo of copper, tallow, and hides or other goods as above mentioned, and to pay freight for the said cargo as follows, (that is to say,) for copper, the sum of 6*l.* sterling per ton; for tallow, the sum of 2*l.* sterling per ton; for hides, the sum of one penny halfpenny sterling per pound, all net

Where by a charter-party the freighter covenanted to provide for the ship [104]

a full and complete cargo consisting of copper, tallow, and hides, or other goods, on which separate rates of freight were to be paid;—held that having sup-

pplied her with as large a quantity of tallow and hides as she chose to take on board, he was not bound to provide any copper, although for the want of it the ship was obliged to keep in her ballast, and did not make so advantageous a freight as she otherwise would have done.

Under a covenant in a charter party to pay freight on skins by the pound, net weight at the King's beam,—freight is due on the outside skins in which the packages are contained.

1814. " weight at the King's beam ; and for all other goods in proportion thereto."

MORISON

PAGE.

The declaration assigned two breaches ; 1st, that the defendant did not furnish and provide for loading on board the said ship a full and complete cargo of copper, tallow, and hides or other goods, but refused to furnish or provide any copper for loading on board the said ship, and only furnished and provided for that purpose, a certain quantity of tallow and hides, the same being then and there wholly inadequate and insufficient to form a full and complete cargo for the said ship as aforesaid ; by means whereof, the plaintiff lost a large sum of money which otherwise would have accrued to him for freight by virtue of the charter-party.—The 2d was for nonpayment of freight for the goods brought home.

[105] The defendant pleaded that he furnished the ship a full and complete cargo ; and that he had paid the amount of the freight.

On the first breach, it appeared that the defendant had provided for the ship a quantity of tallow, and as many hides as she chose to take in, but that he refused to let her have any copper. It was in consequence necessary for her to keep in her ballast, the place of which might have been supplied by the copper, and the amount of the freight which she carried was less than if copper had been supplied.

The plaintiff contended that under the covenant to load the ship, the defendant was bound to furnish her with a properly assorted cargo, so that she might be entirely filled with goods on which freight would be due, and that he was therefore liable in damages for a sum equal to the freight which would have been earned, had 15 tons of copper been put on board.

Lord ELLENBOROUGH.—The parties very likely intended that copper should necessarily form a part of the cargo ; but they have not said so. The covenant leaves a latitude to the freighter, to furnish a cargo of "copper, tallow, hides, or other

goods." Therefore if the ship had as large a quantity of tallow and hides as she could take on board, I think the covenant has been performed.

1814.

*Moorson
v.
PAGE.*

On the 2d. breach, the only question of law was, whether freight could be claimed for the outside skins, in which the packages of skins were inclosed. The outside ones are of an inferior quality, and generally somewhat damaged, and it appeared that freight sometimes is, and sometimes is not received for them. Some doubt was made whether in point of fact they pay duty.

[106]

The defendants counsel strenuously contended that they were not liable to freight.

Lord ELLENBOROUGH. I am quite at a loss to understand on what ground freight should not be paid for the outside skins. They occupy space in the hold of the ship, and are actually a part of the commodity imported. If they escape the payment of duty to the King, this is a violation of the law which ought to be inquired into.

The plaintiff accordingly recovered a verdict for the full amount of the freight he demanded.

Garrett A. G., Marryat, and Campbell for the plaintiff.

Park and Richardson for the defendant.

[Attorneys, *Nind and Robinson.*]

1814.

*Saturday,
Dec. 24.*

RIDSDALE and Others v. SHEDDEN.

A policy of insurance containing a warranty that the ship shall sail on or before a given day, may be altered, pending the risk, by a memorandum, whereby the under-writers in consideration of a further premium agree to cancel the warranty, and to make a return of premium if the ship sail with convoy.

THIS was an action on a policy of insurance, dated 5th June 1810, originally effected on the ship *Essay*, "at and from *Portneuf* to *London*, warranted to sail on or before the 28th October, at six guineas per cent. to return 3 per cent. for convoy."

On the 29th November 1810, the following memorandum was indorsed on the policy, and subscribed by the defendant:

"In consideration of six guineas per cent. additional premium, we agree to annul the warranty of sailing, and agree to return said 6 per cent., if sails with convoy on or before the 31st October."

Topping for the defendant, made a preliminary objection, that the policy as altered could not be read for want of a fresh stamp. The memorandum constituted an entirely new contract between the parties. The consideration and promise were completely changed; and if this alteration were permitted, the same policy might be applied to any future voyage the ship might perform.

[108] Lord ELLENBOROUGH. I think this alteration is justified by 35 Geo. 3. c. 63. s. 13. The policy is still on the same adventure, and its identity remains. The memorandum only modifies a subsisting contract. Then the alteration was made, "before notice of the determination of the risk originally insured;"—"the thing insured remained the property of the same persons;"—and "no additional sum was insured by means of such alteration." (a)

(a) Vide *Hubbard v. Jackson*, 4 Taunt. 169.

Portneuf is a place on the river *St. Lawrence*, about 36 miles above *Quebec*. The *Essay* having completed her landing at *Portneuf*, sailed from thence on the 26th of *October*. There is no custom-house there, and all vessels must clear at *Quebec* that load higher up the river. The ship in question arrived at *Quebec* on the 28th, and got her clearances on the 29th. When she left *Portneuf* she had a sufficient crew for river navigation to carry her down to *Quebec*. While there, she took in several seamen, who were necessary for her safety in the ulterior part of the voyage. This is a usual practice in sailing from ports in the upper part of the *St. Lawrence*. His Majesty's ship *Bonne Citoyenne* was appointed to convoy the trade from *Quebec*. On the 28th of *October* she dropped down from abreast of that city with a considerable number of merchantmen to a place called the *Pillars*, 14 or 15 leagues below, but still within the limits of the port of *Quebec*. There she lay to for vessels that had not been able to join. The captain of the *Essay*, who had come from *Portneuf* by land, received sailing instructions from the Commodore at *Quebec*, on the 27th of *October*, but he was not able to procure a pilot to carry him down till the 30th. On that day he joined the convoy at the *Pillars*. They cleared the port of *Quebec* on the 31st, and the *Essay* was lost in the subsequent part of the voyage. The Commodore returned her to the Admiralty among the vessels that had sailed under his protection.

The defendant had paid a total loss; and the question now was, whether the plaintiffs were entitled to a return of premium for convoy.

Topping, for the defendant, insisted that under these circumstances the ship had not sailed with convoy within the meaning of the policy. The convoy sailed from *Quebec* on the 28th of *October*. At that time the *Essay* had not obtained her clearances, and in point of fact she did not sail till the 30th. The circumstance of her afterwards coming up with the convoying ship is immaterial. In *Taylor v. Woodness*, Park 349. Lord *Mansfield* held, that where a ship warranted to sail with convoy was only two hours in getting under weigh after the convoying ship, the warranty was broken.

1814.

 RIDSDALE
v.
SHREDDEN.

A ship insured is to be considered as having sailed with convoy from a particular port, if she joined the convoying ship, and received sailing instructions within the limits of the port,

[109]

although the latter ship dropped down 15 leagues from the place of loading with the greatest part of the fleet, several days before the ship insured, she being detained with some other ships for want of pilots.

1814.

RIDSDALE
v.
SNEDDEN.

Lord ELLENBOROUGH. There, the master was guilty of culpable negligence, in refusing to weigh according to the signal, in consequence of which he was captured; and it was very properly held that the ship did not sail with convoy. In the present case, I am of opinion, that the ship did sail with convoy before the 31st of October. On the 27th, the master received his sailing instructions, and on the 30th, he came up with the convoy within the limits of the port of Quebec. Where there is no negligence or default, I do not consider it necessary that the ships should all break ground at the same time. Here, for want of pilots, the thing was impossible.

The question then arose, whether the plaintiffs were entitled both to the 6*l. per cent.* mentioned in the memorandum, and the original return of 3*l. per cent.* for convoy provided for in the policy. Lord Ellenborough ruled that they were, and they accordingly had a verdict for 9*l. per cent.*

Garrow A. G., Park, and Coltman, for the plaintiffs.

Topping and Taddy for the defendant.

[Attorneys, Atcheson and Kaye.]

[111]

Saturday,
Dec. 24. *

RIDSDALE and Others *v.* NEWNHAM.

A policy at and from Portneuf, a place above Quebec, contained a warranty to sail on or before 28th October. This was an action on the same policy mentioned in the preceding case, against an underwriter, who had refused to sign the memorandum, annulling the warranty as to the time of the ship's sailing.

to sail on or before 28th October. Before that day the ship actually did sail from Portneuf to Quebec with a crew sufficient for river navigation. She did not obtain her custom house clearances at Quebec (where all ships coming down the St. Lawrence clear out) till the 29th, and she there received some men on board to complete the crew for the voyage. For want of a pilot she did not proceed from Quebec till the 30th.

Held that under these circumstances the warranty to sail on or before 28th October had not been complied with.

The question therefore was, whether she sailed on or before the 28th of *October*.

1814.

Garrow A. G. for the plaintiffs, insisted that she had, as in point of fact she sailed from *Portneuf*, the *terminus a quo*, on the 26th. What afterwards took place at *Quebec* was according to the usage of trade in the River *St. Lawrence*, of which the underwriters must be taken to be cognizant.

RIDSDALE
v.
NEWNHAM.

Lord ELLENBOROUGH.—I am of opinion that the ship had not sailed on or before the 28th of *October*, within the meaning of the policy. She was not then in a capacity to sail, for she had neither obtained her clearances, nor completed her crew. The warranty could only be satisfied by a commencement of the voyage, with a crew competent to carry the ship to her port of destination. When the ship was lying at *Quebec*, obtaining her clearances and taking in her crew, how can she be considered as having sailed on her voyage? She sailed on the 30th, and not before.

The plaintiffs were nonsuited; and the court of K. B. [112] afterwards, on an application for a new trial, approved of the direction of the Judge at Nisi Prius.

Garrow A. G., Park, and Colman, for the plaintiffs.

Topping and Newnham for the defendant.

[Attorneys, *Atcheson and Gregg*.]

1814.

Friday,
Dec. 26.

Where
goods de-
stined to a
foreign
part are
captured
in conse-
quence of
a deviation,
the owners
of the
goods are
entitled to
recover
from the
owners of
the ship,
only the
prime cost

[113]
of the
goods, to-
gether
with the
shipping
charges,
and not
the expence
of effecting
a policy
of insur-
ance upon
them,
without
direct proof
that the
goods at
the time of
the loss
were en-
hanced in
value be-
yond their
first price
to the
amount
sought to
be recover-
ed for in-
surance.

PARKER and Others v. JAMES and Another.

SPECIAL assumpsit against the defendants as owners of the ship *Mary Stevens*, in which the plaintiffs had shipped certain goods to be carried from *Liverpool* to *Trieste*. The declaration alleged that in consequence of a deviation, the ship and goods were captured, and the plaintiffs lost the benefit of a policy of insurance effected upon them, together with the price of effecting the same, and the whole value of the goods, part thereof being uninsured.

The case came on entirely upon admissions, which stated that the defendants were owners of the ship, and that in August 1803, she sailed on the voyage mentioned in the declaration; that goods were shipped on board her at *Liverpool* by the plaintiffs, the cost price of which, with the shipping charges, amounted to 4411*l.* 13*s.* 9*d.*; that the plaintiffs insured the sum of 4000*l.* on these goods, and paid 720*l.* 16*s.* 6*d.* for the premiums of insurance; that the ship deviated from the course of the voyage to chase prizes, and while in the act of deviating and chasing, was captured, whereby the goods became wholly lost to the plaintiffs; that the defendants paid the plaintiffs the whole of the sum of 4411*l.* 13*s.* 9*d.* and refused to pay the sum of 720*l.* 16*s.* 6*d.*; and that the right to recover that in the present action was the only question between the parties.

Park for the plaintiffs contended, that they had a right to recover the premiums of insurance, by the amount of which the goods were enhanced in value beyond their cost price. The premiums might have been covered by the policy, and in that case the defendants clearly would have been liable for the amount: but it could make no difference to them whether the plaintiffs included them in the insurance, or *pro tanto* stood their own insurers. All benefit of the policy was lost by the deviation, and the expence of effecting it ought therefore to fall on the defendants.

Lord ELLENBOROUGH.—The plaintiffs were entitled to recover the value of their goods on board the ship at the time she was captured, by means * of the deviation. They have actually received the cost price of the goods, together with the shipping charges. I have no evidence before me that the goods were worth more. The admissions are silent as to the profit of the adventure. Had there been no insurance, I could not have said, without proof, that the goods were worth more than the cost price and shipping charges ; and I cannot say that by the mere act of insuring, the value of the goods is enhanced by the amount of the premiums. In short, it does not appear that the plaintiffs have sustained more damage by the deviation than is satisfied by the sum already paid them.

1814.

PARKER
v.
JAMES.
[*114]

Nonsuit.

Park, Scarlett, and Starkie, for the plaintiffs.

Topping and J. Warren for the defendants.

{Attorneys, *Milne and Wadeson.*}

1814.

COMMON PLEAS.

SITTINGS AT GUILDHALL.

After Michaelmas Term, 55 Geo. III.

ALLAN v. MAWSON.

An instrument which appears on common observation to be a bill of exchange may be treated as such, although words be introduced into it for the purpose of deception, which might make it a promissory note.

THE plaintiff declared as indorsee against the defendant as drawer of a bill of exchange alleged to have been dishonoured for non-acceptance.

The instrument given in evidence was in the following form :

“ £40.	<i>Bradford, August 2. 1814.</i>
“ Two months after date pay <i>Mr. Lewis Alexander</i> , or	
“ order, forty pounds, value received.	<i>“ Geo. Mawson.</i>
“ * <i>at Sir John Perring,</i>	
“ <i>Shaw, Barber, and Co.</i>	
“ <i>Bankers,</i>	
“ <i>London.”</i>	

[116] This instrument was drawn in *Yorkshire*, and being remitted to the plaintiff, who is an attorney in *London*, he presented it for acceptance to *Perring and Co.*; and as they refused to accept it, he immediately gave notice of its dishonour to the defendant, and commenced an action against him.

* The “*at*” was in very small letters inclosed in the hook of the S which follows.

The question was, whether the plaintiff had a right to treat this instrument as a bill of exchange.

1814.

Vaughan, Serjt. for the plaintiff, relied upon *Shuttleworth v. Stephens*, 1 Campb. 407.

ALLAN
v.
MAWSON.

Shepherd, S. G., contra, offered to prove that such instruments are very generally circulated in *Yorkshire*, where this was drawn, and that they are there universally considered and treated as promissory notes. There was no direction to *Perring and Co.* The note was not drawn upon them. Not being drawees, had they put their names upon the bill, they would not in point of law have been acceptors. The money was merely to be paid at their house, and if they had paid it, they would have done so merely as the agents of the maker,—in the same manner as if they were to pay a bill of exchange accepted by him payable at their banking-house. The instrument, therefore, was wanting in the essential requisites of a bill of exchange, and the plaintiff could have no right to demand payment of it, or to resort to the maker, till the expiration of the two months and three days of grace from its date.

Gibbs, C. J.—Upon the authority of the case cited, I should not have hesitated to decide that, in point of law, this instrument is a bill of exchange, had the word *at* been distinctly written before the names of the drawees. But I shall leave it to the jury whether the word “*at*,” from the manner in which it is written, was not inserted for the purpose of deception, and then the instrument is a bill of exchange in point of fact. The “*at*” being struck out, it is in the common form in which bills of exchange are drawn. The defendant says, “Two months after date *pay*.” This is not a promise to pay, but a request to third persons to pay. I cannot receive evidence of the manner in which such instruments are considered in *Yorkshire*. The defendant, in contemplation of law, issued it in *London*, where Mr. Allan received it. He took it to be a bill of exchange, as almost any other person in *London* would have done. I can see no motive for drawing an instrument in this form, except to deceive the public. If such in-

[117]

1814. struments have been common in the country, they ought not to be continued or endured. Mr. Allan did well in immediately commencing the action, when *Perring and Co.* refuse to accept the bill.

**ALLAN
v.
MAWSON.**

The jury found the insertion of the "at" to be fraudulent and the plaintiff recovered.

[118] *Vaughan, Serjt. and Abbott*, for the plaintiff.

Shepherd S. G. for the defendant.

So an instrument by which the maker promised never to pay, was held a good promissory note. 2 Atk. 32.

Infancy is
a good de-
fence to
an action
on the
warranty
of a horse.

HOWLETT v. HASWELL.

THIS was an action of assumpsit on the warranty of a horse. Plea, the general issue.

It was proved that the defendant, who had been some time in possession of the horse, sold him to the plaintiff with a warranty of soundness, and that he turned out to have been then unsound. But it was proved that the defendant is still under age.

The plaintiff's counsel contended that infancy was no answer to the action. An infant may bind himself by a contract which is for his benefit. Being in possession of a chattel for which he has no use, it is for his benefit to sell it in the usual way in which such chattels are sold. But it is usual to sell a horse with a warranty of soundness, without which he could not be sold to advantage. Therefore an infant is liable for a breach of the warranty. But

GIBBS, C. J. held the contract to be void, and directed a

1814.

Nonsuit.

HOWLET
v.
HASWELL

Park, Serjt. and Taddy, for the plaintiff.

Vaughan Serjt. and Reynolds, for the defendant.

[Attorneys *Tomlinson and Isaacs*.]

Vide *Warwick v. Bruce*, 2 M. and S. 205.

SHEELS *v.* DAVIES.

THIS was an action of assumpsit for the freight of a quantity of butter carried in a general ship, and received by the defendant under the bill of lading.

The defence proposed to be set up was, that the butter had been injured by bad stowage, to a degree much beyond the amount of the freight.

BEST Serjt. and E. LAWES, for the defendant, insisted that this was a sufficient answer to the action, as it shewed that no benefit had been derived from the carriage of the goods; and, at any rate, it might be given in evidence in mitigation of damages. They relied on *Baston v. Butter*, 7 East, 479. and *Farnsworth v. Garrard*, 1 Campb. 38. But

In an action for freight, damage done to the goods by bad stowage cannot be given in evidence, either as a complete defence, or in mitigation of damages.

[120]

GIBBS, C. J. held that the bad stowage of the goods was the subject of a cross action, and did not affect the right to the freight.

1814.

The plaintiff had a verdict for his whole demand. (*a*)

SHEELS
v.
DAVIES.

Vaughan, Serjt. and Gaselee, for the plaintiff.*Best Serjt. and E. Lawes*, for the defendant.[Attorneys, *Gregson and Stratton*.]Vide *Bornmann v. Toohe*, 1 Campb. 377.

(*a*) I was not myself in Court when this cause was tried. The note was furnished to me by a friend at the bar.

[121] HOOPER and Others, Assignees of WELLS, a Bankrupt, v. RAMSBOTTOM and Others.

Upon the sale of leasehold premises, the purchaser accepts bills of exchange for the purchase money; and the original lease and the assignment executed by the seller are deposited with a third person as a collateral security, to be delivered up to the purchaser on payment of the bills. The seller, after some

TROVER for deeds.

By indenture, bearing date 24th December 1811, *John Jones* demised certain premises in Gracechurch Street to *John Storm* for the term of 21 years. By mesne assignments this lease became vested in *John Whittle Harvey*, a partner in the firm of *Harvey and Son*, bankers in Essex. In August 1813, he agreed to sell it to *Wells*, the bankrupt, for 630*l*; that 130*l*. of this sum should be paid in cash; that for the residue *J. W. Harvey* should draw five bills of exchange on *Wells* at 2, 6, 12, 18, and 24 months, and that the assignment of the lease from *J. W. Harvey* to *Wells*, together with the original lease, and the mesne assignments should remain in the hands of *Daniel Whittle Harvey*, an attorney, as a collateral security for the payment of the bills. The bills were drawn, and the deeds lodged with *D. W. Harvey* accordingly. Two of the bills were paid,—when *Wells* became bankrupt. *J. W. Harvey* being then very much pressed for money, went of the bills are paid, gets possession of the lease from the depositary, and pledges it with persons who had advance money upon it, and to whom he indorses the outstanding bills.—Held that the paynees had no lien on the lease beyond the amount of these bills.

to *D. W. Harvey*, and obtained from him the original lease and mesne assignments. These he pledged with the defendants, his town bankers, with other securities, and the defendants *bondâ fide* advanced a considerable sum of money upon them. He likewise gave them the three bills accepted by *Wells* which remained unpaid. The plaintiffs before the commencement of this action tendered payment of these bills to the defendants, and to the assignees of *J. W. Harvey*.

1814.

HOOPER
P.
RAMSBOT-
TOM.
[122]

Shepherd, S. G. for the defendants, contended, that they had a lien on the deeds for their advances. This was like the case of a first mortgagee leaving the title deeds in the hands of the mortgagor, who again mortgages the premises. The title of the second mortgagee is preferred. These deeds never had been delivered to *Wells*, and were subject to any misapplication that the *Harveys* might make of them. That party ought to suffer by whose means *J. W. Harvey* had been enabled to commit the fraud.

Gibbs, C. J.—I am of opinion that the plaintiffs are entitled to recover. Had the deeds been left in the hands of the assignor, this would have been like the case which has been put of the second mortgage. But they were deposited with *D. W. Harvey*, to be given to *Wells* when the instalments were paid. A wrong was committed when he parted with them to another person, and the defendants cannot at any rate acquire a greater lien on the deeds than existed when the original deposit took place. The money due upon the bills with interest has been tendered. Therefore the plaintiffs would have been entitled to recover the deeds from *D. W. Harvey*, and have the same right as against the defendants.

[123]

Verdict accordingly, which was afterwards approved of by the Court, on an application for a new trial.

Lens, Serjt. and *Campbell*, for the plaintiffs.

Shepherd, S. G. and *Curwood*, for the defendant.

1814.

METCALFE v. PARRY.

Policy on
ship " at
and from
Antigua to
England,
with liberty
to touch at
all or any
of the *W.
India* Is-
lands, *Jamaica*
included."
Held, that
the ship un-
der the pro-
tection of
this policy
might touch

[124] at any of
the *W. India*
Islands,
although
not in the
direct
course from
Antigua to
England,
and stay at
such as she
visited the
time nec-
essary to
complete
her home-
ward cargo.

THIS was an action on a policy of insurance on the ship *New Brunswick*, "at and from *Antigua* to *England*, with liberty to touch at all or any of the *West India* Islands, *Jamaica* included, and with liberty to seek, join, and exchange convoys, without being deemed a deviation, at a premium of 25 guineas per cent. to return 5*l.* per cent. for convoy from the *Leeward Islands*, and 5*l.* per cent. more, if the ship should not go to *Jamaica*, and arrived. Warranted at *Antigua*, 27th July 1811."

The ship arrived at *Antigua* before that day, and continued there till the 10th of November, when, not being able to procure a full homeward cargo, she sailed for that purpose to *St. Kitts*, which is out of the line of the voyage to *England*. Here she remained to complete her cargo till the 15th of January following. She then sailed for *London*, but met with so much damage on the voyage that she was forced to put into *Falmouth*, and was abandoned to the underwriters.

Lens, Serjt. for the defendant, made two objections to the plaintiff's title to recover. 1st, The ship had no right to go to *St. Kitts*. The liberty to touch at all or any of the *West India* Islands must be confined to such as lay in the line of the voyage from *Antigua* to *England*; and as many as the ship touched at, she was bound to take them in their geographical order. 2dly, But supposing that she had a right to go to *St. Kitts*, she was not entitled to remain there at the risk of the underwriters for the space of two months. The liberty in the policy was only to touch at all or any of the *West India* Islands. Under that, she could not stay for an unlimited period, with a view to procure a cargo.

Gibbs, C. J.—I think the plaintiff is entitled to recover. The policy appears to me to have authorized the ship to go to *St. Kitts*, and to remain there till her homeward cargo was completed. There is a liberty "to touch at all or any of the *West India* Islands, *Jamaica* included." This shews decisively

that they might be taken without any regard to their geographical order. *Jamaica* is at least 500 miles out of the direct course from *Antigua* to *England*. Then, does not the whole scope of the adventure, as described in the policy, shew that the ship was to go about from island to island, if necessary, for the purpose of seeking for freight? What could be the object of the liberty given her to touch at *Jamaica* if she could not stay there to take in goods? Was she to go 500 miles out of her way for the mere pleasure of viewing that island, and asking for news? The gentlemen of the jury say that this is the winter premium, and that shews that a winter risk was in the contemplation of the parties. (a)

1814.

 METCALFE
v.
PARRY.

Verdict for the plaintiff.

The ship sailed on the homeward voyage without convoy, and without a licence, but the captain swore that this was done without any orders from his owners, who reside in *England*.

Lens, Serjt. insisted that they were bound by the acts of the captain, who was their agent, and that the insurance was thus vitiated by the convoy act, which would otherwise be rendered a nullity. Where there is an insurance on goods, it may be necessary to shew, by direct evidence, that the assured was privy to the ship sailing without convoy, but that must be presumed where the insurance is on ship.

To invalidate a policy on ship on the ground that she sailed without convoy, it is necessary to prove that this happened with the privity of the owner.

GIBBS, C. J. after referring to the statute, expressed himself of opinion, that to affect the validity of the policy on this ground, it is necessary in all cases to prove the privity of the assured to the ship sailing without convoy. [126]

Shepherd, S. G., *Vaughan*, Serjt. and *Campbell*, for the plaintiff.

Lens, Serjt. and *Richardson*, for the defendant.

[Attorneys, *Hind* and *Dennett*.]

Vide *Cohen v. Hinckley*, 1 Taunt. 249. *Wake v. Atty*, 4 Taunt. 493.

(a) Vide *Bragg v. Anderson*, 4 Taunt. 229.

C A S E S

ARGUED AND DECIDED

AT

NISI PRIUS

IN

THE COURT OF KING'S BENCH,

At the Sittings after

Hilary Term,

In the Fifty-fifth Year of GEORGE III. 1815.

FIRST SITTINGS AFTER TERM AT WESTMINSTER.

Tuesday,
Feb. 13.

HARTLEY v. JOSEPH WILKINSON and Another.

An instrument pur-
porting on
the face of
it to be a
promissory
note pay-
able abso-
lutely for
the price of
goods, but
having an
indorse-
ment upon
it, stating,
that it was
given on

[128]
condition
that if any
dispute

THIS was an action by the indorsee of a promissory note,
dated 4th April 1814, whereby the defendants jointly
and severally promised to pay John Foster, or order, the sum
of 25*l.* being the amount of the purchase-money for a “quan-
tity of fir belonging to D. Hartley, and then lying in the
“parish of Fillingham.”

Upon the note was the following indorsement :

“ This note is given on condition, that if any dispute shall
“arise between Lady Wray and D. Hartley respecting the
“sale of the within-mentioned fir, then the note to be void.”

arose about the sale of the goods it should be void, is not a negotiable promissory note.

It appeared, that *D. Hartley*, the plaintiff, had bought some fir-timber from *Lady Wray*, at *Fillingham*, in *Lincolshire*, which he had not paid for. This same timber was sold by his agent, *John Foster*, to the defendant, *Joseph Wilkinson*, and it was agreed that a promissory note should be given for the value, which the other defendant was to sign as a surety. After the body of the note had been written, but before it was signed by either of the defendants, a conversation arose about *Lady Wray* still claiming the timber, as she had not been paid for it: whereupon, with *Foster's* concurrence, the above indorsement was written on the note, and the defendants then signed it.

1815.

 HARTLEY
v.
WILKIN-
SON.

Abbott for the defendants contended, that under these circumstances the indorsement was to be taken as part of the note, and if so, then it was not payable absolutely, but upon a condition, and therefore it was void. He relied upon *Leeds v. Lancashire*, 2 Campb. 205.

Park, contrà, insisted, that the indorsement was no part of the instrument, and if it were, that it merely expressed what would otherwise have been implied, and therefore had no operation.

Lord ELLENBOROUGH held, that as the indorsement had been written before the note was signed, it must be taken to be part of it; and that as the note was to be void on any dispute arising between *Lady Wray* and *D. Hartley*, the payment was conditional only, and the instrument was not a promissory note within the statute of *Anne*.

[129]

The plaintiff was nonsuited; and the Court of K. B. in the ensuing term refused a rule to shew cause, why the nonsuit should not be set aside.

Park and *Barnewall* for the plaintiff.

Abbott for the defendant.

1815.

FIRST Sittings AFTER TERM AT GUILDFHALL.

*Saturday,
Jan. 28.*

CHESMER v. NOYES.

A notarial protest under seal, is no evidence that a foreign bill of exchange has been presented for payment in England.

[130]

THIS was an action on a foreign bill of exchange drawn at *St. Croix*, upon a person at *Bristol*.

In the course of the trial, it became material to shew that the bill had been presented to him for payment.

For this purpose, the plaintiff's counsel offered as evidence a notarial protest under seal, stating the fact of the presentment in the usual form, and contended that by the usage of merchants a protest under a notary's seal is evidence of the dishonour of foreign bills of exchange.

Lord ELLENBOROUGH.—The protest may be sufficient to prove a presentment which took place in a foreign country; but I am quite clear that the presentment of a foreign bill in *England*, must be proved in the same manner as if it were an inland bill, or a promissory note.

The plaintiff had a verdict upon other evidence.

Campbell for the plaintiff.

The cause was undefended.

1815.

BESSEY v. EVANS.

*Saturday,
Jan. 28.*

INDEBITATUS assumpsit for demurrage.

The ship was let by the plaintiff to the defendant for a voyage from *Heligoland* to *London*. The agreement provided that the defendant should be allowed 30 days for loading and unloading the cargo, and should pay three guineas a day demurrage for every day beyond that time.

The whole of the cargo was unloaded in the port of *London* within the running days, except four barrels of pitch, which the officers of the customs would not permit to be landed till 17 days after. It did not appear that there was any thing illegal or irregular in the importation of the pitch. However, the master of the ship apprehending there might be some difficulty about it, remonstrated against taking it on board at *Heligoland*.

Abbott, for the defendant, contended, that he could not be liable for the wrongful act of the custom-house officers in detaining the ship; and if they were justified in detaining her, then the plaintiff could not complain of what had arisen from his own violation of the law of the land.

Lord Ellenborough.—You stipulated that the goods should be loaded and unloaded in 30 days, or that you should pay three guineas a day demurrage. At the expiration of the 30 days, I think you became liable for demurrage, although you have been prevented from unloading the goods within that time by the wrongful act of a stranger. Then as to the supposed illegality of the importation, (of which there is no evidence,) you can have no right to complain of that, after having compelled the master to take the pitch on board.

It is no defence to an action for demurrage, that the delay in unloading the ship arose from the act of custom-house officers, in unlawfully seizing a part of the cargo.

[132]

The plaintiff recovered.

1815. *Scarlett and Ballantine* for the plaintiff.

* **BESSEY
v.
EVANS.** *Abbott* for the defendant.

[Attorneys, *Wilson and Bonell.*]

Vide *Leer v. Yates*, 3 Taunt. 387. *Jesson v. Sully*, 4 Taunt. 52.
Randall v. Lynch, 2 Campb. 352.

1815.

ADJOURNED Sittings at WESTMINSTER.

MARSHALL and Another v. CLIFF and Another.

Friday,
Feb. 17.

THIS was an action against the defendants as owners of the ship *Arundel*, for not properly carrying goods of the plaintiffs.

To prove the defendants to be owners of the vessel, there was put in an undertaking in the following form, given before the action was commenced, by the gentleman who was afterwards their attorney on the record.

“ I hereby undertake to appear for Messrs. *Thompson* and “ *Marshall*, joint owners of the sloop *Arundel*, to any action “ you may think fit to bring against them.

“ *Richard Corner.*”

Marryat for the defendants insisted, that they were not bound by this undertaking, as it was given at a time when Mr. *Corner* was not attorney in the cause; and the plaintiffs were at any rate bound to offer some other evidence of his agency at that time than the mere circumstance of his since having become the attorney on the record.

Lord ELLENBOROUGH.—I think this is sufficient *prima facie* evidence. The court would have enforced the undertaking by attachment. I must presume that Mr. *Corner*, who is now the attorney on the record, was then the agent of the defendants, and had authority from them to admit that they were joint owners of the vessel.

[134]

The plaintiffs had a verdict.

In an action against the owners of a ship, it is sufficient *prima facie* evidence of ownership, to put in an undertaking to appear for them, given before the commencement of the action by the person who subsequently acted as their attorney in defending it, in which he describes them as owners;—without further proof of agency.

1815. The Attorney-General and *Comyn* for the plaintiffs.

MARSHALL,
v.
CLIFF.

Marryatt and Nolan for the defendants.

[Attorneys, *Carter and Brown.*]

Le Loin v. BRISTOW.

In an action by a servant against his master for wages, the latter cannot generally set off the value of goods lost by the negligence of the former ; but if it be

[135] proved to have been part of the original agreement between them, that the servant should pay out of his wages for all his master's goods lost through his negligence, the value of goods so lost may, under the general issue, be deducted from the amount of the wages.

THIS was an action for servant's wages. Plea, the general issue, with a notice of set-off.

It appeared that the plaintiff had served the defendant, an officer on the staff of the *Duke of Wellington*, in *Spain*, and that there was a balance of wages due to him of 3*l.*

The defence was, that it had been agreed between the parties that the plaintiff should pay for whatever was entrusted to his care, and was lost through his negligence ; and that articles belonging to the defendant of greater value than the sum demanded had been lost in this manner through the plaintiff's negligence.

Lord *ELLENBOROUGH* said, that the value of these articles was not the subject of set-off ; but that if it could be proved to be part of the original contract, that the plaintiff should pay out of his wages the value of his master's goods lost through his negligence, this would be tantamount to an agreement that the wages should be paid only after deducting the value of the things so lost, which would be a good defence under the general issue.

The defendant, however, was only able to prove an admission by the plaintiff, that he was liable to pay for the articles lost, which was held to be insufficient, and the plaintiff had a verdict for 3*l.*

Topping and E. Lawes for the plaintiff.

1815.

Horner for the defendant.

LE LOIR
v.
BRISTOW.Vide *Brown v. Hodgson*, 4 Taunt. 189.

FURNEAUX v. FOTHERBY and CLARKE.

[136]

TRESPASS for breaking and entering the plaintiff's house and distraining his goods. Plea, the general issue.

It was proved that the defendant, *Fotherby*, on the 1st of October last, did enter the plaintiff's house, and make the distress, but there was no evidence against *Clarke*.

The defence was, that the plaintiff had held another house as tenant to the defendant *Clarke*; that the goods distrained were clandestinely and fraudulently conveyed away from this house on the 28th of September, to prevent the landlord from distraining them for the arrears of rent to become due the following day, and that they were within 30 days afterwards taken and seized as a distress for the said arrears of rent.

Holt, for the plaintiff, first contended, that there was no right to follow these goods, as they were removed before the rent became due, *Watson v. Main*, 3 Esp. 15.; and, 2dly, that at all events this was no defence under the general issue, as the goods were not taken upon the premises for which the rent became due, *Vaughan v. Davis*, 1 Esp. 257.

Q. Whether a landlord can follow and distrain upon goods fraudulently removed from the premises the night before the rent became due, for the purpose of avoiding a distress?

In trespass for taking goods, where the defence is, that they were taken as a distress for rent, having been clandestinely removed from the premises, this must be specially pleaded.

Lord ELLENBOROUGH.—Upon the first point I entertain considerable doubts, and if the cause had turned upon that, I should have reserved it for the opinion of the Court. Where

[137]

1815.

FURNEAUX
v.
FOTHERBY
and
CLARKE.

goods are fraudulently removed from the premises in the night, to prevent the landlord from distraining upon them for arrears of rent to become due next morning, the case certainly comes within the mischief intended to be remedied by 11 Geo. 2. c. 19., and there is some ground to contend that it comes within the provisions of that statute. But, upon the 2d point, I am clearly of opinion, that the defendant was bound to justify specially. (a)

The plaintiff had a verdict against *Fotherby*; and Lord *Ellenborough* granted a certificate under 8 & 9 W. 3. c. 11. that there was reasonable ground to join *Clarke* as a defendant, for the purpose of depriving him of a right to costs. (b)

Holt and *E. Lawes* for the plaintiff.

Park for the defendant.

(a) Vide 11 G. 2. c. 19. § 1, 2. 2 Wms. S. 284. (n. 2.)

(b) Vide *Aaron v. Alexander*, 3 Campb. 36.

1815.

ADJOURNED SITTINGS AT GUILDHALL.

UNDERWOOD v. ROBERTSON.

Tuesday,
Feb. 28.

THIS was an action on a policy of insurance on goods at *London* and from *London* to *Demerara*.

The ship was captured near that place by an *American* privateer. She was plundered of her stores, and the whole of her crew taken out, except the captain and a boy. She was afterwards recaptured and carried into *St. Thomas's*, where she arrived on the 12th of *October*. The captain went himself almost immediately to *Tortola*, where the Vice-admiralty Court for these islands sits, and on the 15th of the same month, upon a petition presented for that purpose, obtained an order to sell the ship and cargo.—Being now examined as a witness, he swore that he could not procure a crew of any sort to carry the ship from *St. Thomas's* to *Demerara*, and that without selling the cargo he could not pay the salvage. The cargo was sold at a loss of more than 60*l.* per cent.—The defendant paid into court a sufficient sum to cover his proportion of the salvage, &c.; and the question was, whether the captain, under these circumstances, had a right to sell the cargo, and to break up the adventure, so as to entitle the plaintiff to recover against the underwriters as for a total loss.

Lord ELLENBOROUGH.—I think it of great importance to prevent a partial loss from being turned into a total loss by unnecessarily breaking up the adventure. In this case, although the captain could not at first procure a competent crew to navigate his vessel, he ought to have waited a reasonable time for that purpose. Ships that came in might have spared him assistance, or seamen might possibly have been obtained from the neighbouring islands. But having

Held that the underwriters on goods insured from *London* to *Demerara* were only liable for an average loss, where the ship, being captured and recaptured, was sent into *St. Thomas's* strip of all her hands, and the captain not being able on his arrival there to procure a fresh crew, or to raise money to pay the salvage, immediately sold the ship and cargo, and [139] broke up the adventure.

1815.
 UNDER-
 WOOD.
 v.
 ROBERT-
 SON.

[140]

arrived at *St. Thomas's* on the 12th, he on the 15th gets a decree from the Vice-admiralty Court at *Tortola* for the sale of the ship and cargo. I conceive that under these circumstances he had no right to sell the cargo.* To enable him to pay the captors' eighth, he was bound to have tried, and to have tried seriously and deliberately, every other expedient to raise money before disposing of any part of the goods entrusted to his care. It does not satisfactorily appear that he might not have raised the money by drawing on his owners, or by hypothecating the ship. He came to his conclusion in three days. The sale of the cargo was only to be resorted to in the last extremity, when every other expedient had failed, and every other resource was hopeless. I think the underwriters are liable for the salvage and plunderage, and no farther. There was here no loss of the adventure by any peril insured against. Even if the ship insured was prevented from completing the voyage, it does not appear that the goods might not have been forwarded to their place of destination by other vessels.

There was a verdict for the defendant; and the Court of K. B. in the ensuing term refused a rule to shew cause why there should not be a new trial.

Garrow A.G., Topping, and Marryat, for the plaintiff.

Park and Scarlett for the defendant.

Vide *Anderson v. Wallis*, 2 M. & S. 240.

BELWORTH v. HASSELL.

THIS was an action for not accepting or paying for the assignment of the lease and good will of a public house.

By a written agreement between the parties, dated 18th November 1814, *Belworth*, "in consideration of the sum of "350*l.*, agreed to sell, assign, and set over to *Hassell* the unexpired term of eight years' lease and good will of the house "and premises then occupied by *Belworth*, called and known "by the name or sign of the *White Hart*, situate, &c. subject "to the rent and covenants contained in the lease." Possession was to be delivered up on the 19th of December following.

A few days after the agreement was signed, an abstract of the lease was handed over to the defendant's solicitor, who prepared a draft of the assignment, and requested that it might be ingrossed on the back of the lease by the plaintiff's attorney. This was accordingly done; but when the day came, the defendant refused to take the premises unless an allowance was made to him for dilapidations.

The objection now relied upon was, that the plaintiff had not in him to sell that which he professed to sell by the agreement, which was therefore void. It was proved, that on the 18th of November the unexpired term in the lease was only seven years and seven months.

Lord Ellenborough.—The parties cannot be supposed to have meant that there was the exact term of eight years unexpired, neither more nor less by a single day. The agreement must therefore receive a reasonable construction; and it seems not unreasonable that the period mentioned in the agreement should be calculated from the last preceding day when the rent was payable, and including, therefore, the current half year. Any fraud or material mis-description, though unintentional, would vacate the agreement; but the de-

Where
there was
a written
agreement
to sell and
assign "the
unexpired
term of
eight years'
lease and
[141]
good will
of a public
house :
Held that
the pur-
chaser
could not
refuse to
perform the
agreement
on the
ground that
when it was
entered into,
there
were only
seven years
and seven
months of
the term
unexpired.

1815. defendant might here have had substantially what he agreed to purchase.

BELWORTH

v.

HABSEL. Verdict for the plaintiff, subject to an award as to the amount of the damages.

Garrow A.G. and *Campbell* for the plaintiff.

Park and *Lawes* for the defendant.

[Attorneys, *Osbaldeston and Ware*.]

*Friday,
March 3.*

Policy "on
40 carboys
of vitriol."
They were
carefully
stowed on
deck; but
caught fire,
and were
necessarily
thrown
overboard
during the
voyage:
Carboys of
vitriol are
sometimes

[143] stowed on
the deck,
and some-
times bed-
ded in sand
in the hold,
where they
are consid-
ered safer.
Held that
the under-
writers in
this case
were liable,
although

there was no communication to them that the carboys were to be stowed on deck.

DA COSTA v. EDMUNDS.

ACTION on policy of insurance at and from *London* to *Lisbon*. The insuree was declared by the policy to be "on 40 carboys of vitriol."

These carboys were placed on the deck, and carefully lashed to the ship's side. A storm arose during the voyage, and a heavy sea having broken several of the carboys, the vitriol caught fire, and for the preservation of the ship, it was necessary to throw the whole overboard. The ship and the rest of the cargo arrived safe at *Lisbon*. It appeared that carboys of vitriol are very frequently carried on the decks of ships, but that it is likewise usual to stow them below, bedded in sand, in which situation they are considered safer.

It was contended for the underwriters, that they were not liable, as no communication was made to them of the manner in which these carboys of vitriol were to be carried; ~~and~~ it is a general principle, that underwriters are not liable for goods stowed on the deck. (a)

(a) *Ross v. Thwaites*, Park 25. *Backhouse v. Ripley*, ib.

Lord ELLENBOROUGH left it to the jury to say whether it was usual to carry vitriol on the deck, and whether these carboys were properly stowed. If there was a usage to carry vitriol on deck, the underwriters were bound to take notice of it without any communication, and all they could require was, that these carboys should be properly stowed in the usual manner. On the other hand, they were not liable if the goods were carried on the deck without such a usage, or if they were not stowed there in a skilful and proper manner.

1815.

 DA COSTA
v.
EDMUNDs.

The jury found for the plaintiff; and the Court, in the ensuing term, refused a rule to shew cause why there should not be a new trial.

Park and Abbott for the plaintiff.

Garrow A. G. for the defendant.

 GARDINER v. GRAY.

 [144]
Monday,
March 6.

THE first count of the declaration stated, that the defendant undertook that 12 bags of waste silk, purchased of him by the plaintiff, should be equal to a sample produced at the time of the sale. Other counts stated the defendant's promise to be, that the silk should be *waste silk* of a good and merchantable quality.

The silk in question was imported from the continent, and before it was landed, samples of it, which the defendant had received in a letter, were shewn to the plaintiff's agent. The bargain was then made, and the sale note was written, which merely mentioned that 12 bags of *waste silk* were sold at 10s. 6d. per lb. without referring to the samples, or specifying particularly the quality of the commodity. The silk

Where before or at the time of sale a specimen of the goods is exhibited to the buyer, if there be a written contract which merely describes the goods as of a particular denomination,—this is not a sale by sample; but there is an implied warranty that they shall be of a

merchantable quality of the denomination mentioned in the contract.

1816. was purchased in *London*, and sent down to the defendant at *Manchester*. On its arrival there, it was examined, and found to be much inferior to the samples, and of a quality not saleable under the denomination of "waste silk."

GARDINER v. GRAY.

[145] Lord ELLENBOROUGH.—I think the plaintiff cannot recover on the count alledging that the silk should correspond with the sample. The written contract containing no such stipulation, I cannot allow it to be superadded by parol testimony. This was not a sale by sample. The sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity. I am of opinion, however, that under such circumstances, the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. *Where there is no opportunity to inspect the commodity, the maxim of caret emptor does not apply.* He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill. The question then is, whether the commodity purchased by the plaintiff be of such a quality as can be reasonably brought into the market to be sold as *waste silk*? The witnesses describe it as unfit for the purposes of waste silk, and of such a quality that it cannot be sold under that denomination.

Verdict for the plaintiff.

Garrow A. G., Park, and Puller, for the plaintiff.

Scarlett and Taddy for the defendant.

1815.

RAITT v. MITCHELL and Another,

*Tuesday,
March 7.*

CASE. The declaration contained several special counts for wrongfully detaining the plaintiff's ship, which had been delivered to the defendant to be repaired,—with a count in trover.

The defendants are shipwrights, and have a dock in the river *Thames*. In *October* last, the plaintiff having purchased an *East Indiaman* called the *Ocean*, delivered her to the defendants to be repaired, and she was placed in their dock for that purpose. Nothing whatever passed between the parties with respect to the time or manner in which the repairs were to be paid for, until the end of *December*, when they were completed. The plaintiff having then required that the ship should be delivered back that she might proceed on her voyage to the *East Indies*, the defendants said she should not leave their dock till security was given for the repairs, which amounted to above 3000*l.*, and considerably exceeded what they supposed would have been necessary. The plaintiff, protesting against the defendants' right to detain the ship,—from his anxiety to get possession of her, was willing to give them security for the fair amount of their bill; and to ascertain this, several meetings took place between the parties, and arbitrators were appointed. However, they could arrive at no conclusion upon the subject, and the defendants peremptorily refused to allow the ship to be undocked till the whole of their demand was paid, or security given for it.

A shipwright in the river *Thames* has no lien on a ship taken into his dock to be repaired, without an express agreement for that purpose,—credit being given by the usage of trade to the owner of the ship for the repairs. After, where a shipwright deals for ready money.

[147]

On the part of the plaintiff, it was now proved, that by the usage of trade in the river *Thames*, where there is no express agreement as to the time of payment, the shipwright invariably gives credit for repairs to the owner of the ship repaired. The credit varies in different trades. It is generally fifteen months; with respect to *East India* ships, it is eighteen months; but without a previous stipulation for that purpose, neither a ready money payment, nor security is ever required.

1815.

RAITT
v.
MITCHELL.

Park for the plaintiff contended, that under no circumstances is there a lien for the repairs of a ship, even where there is to be a payment in ready money. There is no case in which it has ever been decided that such a lien exists, and the dicta upon the subject are loose and inconsistent. There may be a difference between workmanship bestowed on ships and other chattels, on which it has been determined that the workman has a lien. With regard to ships, the workmanship generally bears a very small proportion to the value of the subject on which it is bestowed ; and it is considered a matter of public policy that ships should be employed, which are built to “ plough the seas, not to rot by the walls.” At any rate, [148] there can be no pretence for saying that a lien exists in this instance, where the defendants had no right to demand payment till the expiration of 18 months.

Garrow A. G., contrà. It is an established principle that an artizan has a lien on any chattel on which he has bestowed his labour in the course of his trade. There is no reason why this should not extend to a ship in the dock of a shipwright. If he does any little job to her while she is lying in the open river, he cannot be considered as having her in his possession, and without the physical power of detention, a lien cannot exist. But there appears to be no real difference between a ship in the dock of a ship carpenter and a coat in the workshop of a tailor. The repairs may bear quite as large a proportion to the value of the subject repaired ; they are equally in the custody of the repairer ; and the one has as good a right as the other to have his debt secured. Where there is an express stipulation for a definite credit, it may be admitted that the lien is gone. But here there was no agreement upon the subject ; and all the authorities concur that it is in the absence of a special agreement between the parties that the lien attaches. It is impossible for the plaintiff to rely upon any usage of trade, for usage must be uniform ; and according to the evidence, the credit given by shipwrights constantly varies. The credit they give, therefore, is only a voluntary courtesy, and imposes no legal obligation to abstain from enforcing payment of their debts.

[149]

Lord ELLENBOROUGH.—I am of opinion that in this case the defendants had no right to detain the plaintiff's ship. It is distinctly proved that where there is no express stipulation for a ready money payment, credit is invariably given by shipwrights in the river *Thames*. The period of credit varies in the different trades in which ships are employed; but in each trade it appears to be uniform, and for the repairs of Indiamen we are told it is 18 months:—at the expiration of which it is expected they shall have returned from their voyages, and put funds into the hands of their owners by the freight they have earned. This being the invariable usage, I must consider it as the basis of the contract between these parties; and their respective rights and liabilities are precisely the same as if, without any usage, they had entered into a special agreement to the like effect. In that case, it seems to be admitted that no lien could be claimed. To be sure, a lien is wholly inconsistent with a dealing on credit, and can only subsist where payment is to be made in ready money, or there is a bargain that security shall be given the moment the work is completed. I do not say that a shipwright has not a lien on a ship in his dock, where he is to be paid in ready money as soon as the repairs are finished; on the contrary, I am inclined to think that he has a lien like other artificers. But there can be no lien without an immediate right of action for the debt, and that does not accrue till the period of credit has expired.

1815.

 RAITT
 v.
 MITCHELL.

[150]

Verdict for the plaintiff.

Park, Scarlett, and Campbell, for the plaintiff.

Garrow A. G. and Barrow for the defendants.

[Attorneys, *Kearsey and Knight*.]

See all the authorities on this subject collected, Abb. Shipp. Part II. c. iii. 9—14. b.

1815.

Tuesday,
March 7.

MALLOUGH v. BARBER and Others.

Insurance brokers were ordered to effect a policy "at and from Teneriffe to London :" Held that they were liable for not inserting in it a liberty "to touch and stay at all or any of the Canary islands,"

[151]
that being usually inserted in policies from Teneriffe.

THIS was an action against the defendants for negligence in effecting a policy of insurance for the plaintiff. Being insurance brokers in *London*, they were ordered by the plaintiff to effect "a policy for 550*l.* on the ship *Expedition* "and her freight, at and from *Teneriffe* to *London*, at 10 "guineas per cent."

They effected the policy in the words of the order communicated to them, without inserting a liberty "to touch and stay "at all or any of the *Canary* islands."

The *Expedition* having taken in some goods at *Teneriffe*, proceeded to *Lanzarotte* to complete her cargo, and was afterwards captured. The underwriters refused to pay, on the ground of deviation.

A great number of insurance brokers now swore, that where an order is given to effect insurance "at and from *Teneriffe*," it is the invariable practice, without any particular instructions for that purpose, to insert in the policy "a liberty to "touch and stay at all or any of the *Canary* islands," as ships seldom take in the whole of their cargoes at *Teneriffe*, but generally go to some of the other islands to complete their loading.

Lord *ELLENBOROUGH* held that, under these circumstances, the defendants were liable for not having inserted the clause in the policy in question—and the plaintiff recovered a verdict for the sum directed to be insured, deducting the premiums.

Park, Topping, and Jones, for the plaintiff.

Garrow A.G., Park, and Abbott, for the defendants.

COURT OF COMMON PLEAS.

Sittings after Term at Westminster.

DITCHBURN v. GOLDSMITH.

Thursday,
Feb. 16.

THIS was an action on a wager laid the 5th of September 1814, whereby the defendant betted the plaintiff 200*l.* to 100*l.* that *Joanna Southcot* would be delivered of a male child before the 1st day of November then next ensuing.

An action cannot be maintained upon a wager, whether an unmarried woman has had a child.

The declaration being opened,—

The defendant's counsel objected that this was not a fit cause to be tried in a court of justice, and suggested the propriety of stopping the trial.

GIBBS C. J. refused to do so in the first instance, as it did not appear who *Joanna Southcot* was, or how the parties were connected with the subject of the wager.

Witnesses were accordingly called, who proved that the wager was laid by the parties without either of them having any pecuniary interest in the question,—and from whose cross-examination it appeared that *Joanna Southcot* was at that time and continued till her death, an unmarried woman.—As soon as this fact was established,

[153]

GIBBS C. J. said, I am now fully warranted in stopping the trial. Can it be endured that upon an idle wager between persons who have no interest in the question, a court of justice shall be occupied in investigating whether an unmarried woman has had a bastard ?

1815.

DITCH-
BURN
v.
GOLD-
SMITH.

The plaintiff's counsel admitted, that in general no action could be supported on such a wager; but undertook to shew, that in this case there could be no injury done to the feelings, or the reputation of the individual named, as *Joanna Southcot* was a pretended prophetess, who before the wager was laid, had publicly announced that she was pregnant of a male child, although she pretended to be still a virgin; who often challenged inquiry upon the subject; and who was since removed by death from the shame which a detection of her imposture might otherwise have occasioned to her. But

[154] GIBBS C. J. said, that whether he was to try the cause or not, could not depend upon the notions of chastity or morality of the female who was the subject of the wager, and that as soon as it appeared that she was unmarried, he resolved he would not try the cause—following the example of Lord *Loughborough* (a), and Lord *Ellenborough* (b) upon two similar occasions.

Trial stopped.

Best Serjt. and *Campbell* for the plaintiff.

Onslow Serjt. and *Comyn* for the defendant.

[Attorneys, *Dibary* and *Pearson*.]

(a) Lord *Loughborough* refused to try an action on a wager, “whether there are more ways than six of nicking seven on the dice, “allowing seven to be the main, and eleven a nick to seven.” *Brown v. Leeson*, 2 H. Bl. 43.

(b) And Lord *Ellenborough* acted in the same manner with regard to an action on a wager “whether a person may be lawfully held to bail on a special original for a debt under 40*l.*” *Henkin v. Gerss*, 2 Campb. 408.—It was held, however, by the Court of C. P. that an action may be maintained on a wager of *a rump and dozen*, whether the defendant be older than the plaintiff, *Hussey v. Crickett*, 3 Campb. 168.

1815.

ADJOINED Sittings at Guildhall.

MILLAR v. HEINRICK.

Tuesday,
Feb. 21.

ACTION for seamen's wages earned on board a *Russian* ship, in a voyage from *Cronstadt* to *London*.

The plaintiff had signed articles at *Cronstadt*, which stated that he was to have monthly wages, subject to the deductions provided for by the regulations of the *Russian* marine.

The defence set up was, that by these regulations, when a ship is in port, the seamen are only entitled to half wages, and that the ship in question during this voyage was in port so long as to reduce the plaintiff's wages below the sum actually paid to him.

Copley Serjt. for the defendant, allowed that these regulations were in writing, and that he could produce no copy of them, but undertook to prove their contents by the parol examination of witnesses.

Gibbs C. J. That will not do. Foreign laws not written, are to be proved by the parol examination of witnesses of competent skill. But where they are in writing, a copy properly authenticated must be produced.

[156]

The plaintiff had a verdict.

Shepherd S. G. and *Brougham* for the plaintiff.

Copley Serjt. for the defendant.

[*Attornies, Mitchell and Bennett.*]

See authorities referred to, 1 Campb. 65. n.

The written
laws of a
foreign
state, can
only be
proved by
copies pro-
perly au-
thenticated.

1815.

*Tuesday,
Feb. 21.***EVANS v. JUDKINS.**

An offer to pay a sum of money to be accepted as the whole balance due, where a larger sum is claimed, does not amount to a legal tender.

IN this case, issue was joined upon a tender of the sum of 17*l.*

It appeared from the evidence, that the parties having met, the plaintiff claimed a balance of 20*l.*; the defendant insisted there was only 17*l.* due; this sum he had in his pocket, and offered to produce and pay to the plaintiff, if the latter would accept it as the whole balance really due; the defendant said, there was no use in producing it, as he would take nothing less than the 20*l.*

[157] **GIBBS C. J.** I am of opinion this was not a legal tender, as it was not unqualified. Had the defendant offered to pay the 17*l.* leaving open the plaintiff's right to an ulterior demand, that would have been sufficient; but an offer of payment clogged with a condition that it should be accepted as the balance due does not amount to a legal tender.

The plaintiff had a verdict.

Vaughan Serjt. and *Espinasse* for the plaintiff.

Best Serjt. and *West* for the defendant.

[*Attorneys, Hughes and Clarke.*]

The same point was decided by the court of K. B. in *Free v. Kingston*, T. T. 1815. That case had been referred to a gentleman at the bar, who upon similar evidence held the tender to be insufficient; and upon an application to set aside his award, the court approved of what he had done.

1815.

BLAND v. COLLETT.

*Friday,
Feb. 24.*

ACTION for money had and received, to recover the sum of 80 guineas.

The plaintiff, the defendant, and a person of the name of *Porter*, having been at the *Newmarket* races in *October* last, the plaintiff one evening boasted of being acquainted with Lord *Kensington*, and having conversed with him on the turf, at a former *Newmarket* meeting. *Porter* asserted that the plaintiff had never spoken to Lord *Kensington* in his life. A bet was talked of upon the subject; but none was then laid. Next morning the parties again met, when *Porter* asked “What will you now lay that you conversed with Lord *Kensington*?” The plaintiff answered, “80 guineas to 10.” The money was accordingly deposited in the hands of the defendant, as a stakeholder. Upon which *Porter* exclaimed, “Now I have you; I have made inquiries, and the person you conversed with was Lord *Kingston*; not Lord *Kensington*.” The plaintiff owned his mistake; but said he had been imposed upon, and gave notice to the defendant not to pay over the money.

Vaughan Serjt. for the plaintiff contended, that he had a right to recover back the 80 guineas, as this was a bubble bet.

GIBBS C.J.—I think the action cannot be maintained. There is nothing illegal in the wager. Nor can it be said that the point was certain as to one party, and contingent as to the other. The plaintiff relied upon his own observation, *Porter* upon the information he had received. The former was the more confident of the two; and either might have turned out to have been mistaken.

The party who lays a wager on the identity of a person with whom he has conversed, cannot set it aside on the ground that at the

[158] time when it was laid the opposite party had received certain information that he was mistaken, and it is too late for him, on discovering his mistake, to command the authority of the stakeholder to pay over the money better.

Verdict for the defendant.

1815.

Vaughan Serjt. and Marryat for the plaintiff.

**BLAND
COLLETT**

Lens Serjt. for the defendant.[Attorneys, *Bower and Newcomb.*]

Vide *Lord March v. Pigott*, 5 Burr. 2802. *Brandon v. Hebert*, ante, 37.

*Friday,
Feb. 24.*

HARMAN v. CLARKE and Others.

Where a bill of lading of goods by a general ship deliverable to order, contains a stipulation that all the goods are to be taken out in a certain number of days after arrival, or to pay demurrage, the indorsee of the bill of lading who takes out

[160]
the goods is liable for demurrage, from the expiration of the lay days calculated from the arrival of the ship, without receiving any

notice of that event. Where there is such a bill of lading, if there be any inaccuracy in the entry of the ship's name at the custom-house, whereby the owner of the goods, notwithstanding proper inquiries for that purpose, was deprived of the usual means of being informed of the ship's arrival, demurrage cannot be recovered.

THIS was an action for demurrage.

The plaintiff was master of a ship called *Die Treue*, which in *October* last made a voyage as a general ship from *Rotterdam* to *London*.

Amongst other goods she carried a number of casks of geneva, shipped by a house at *Rotterdam*, for which the plaintiff signed a bill of lading, making them deliverable to *the order of the shippers on payment of freight*. In the margin of the bill of lading were the words—"to be taken out in fourteen days after arrival, or to pay eighty shillings a day demurrage."

The plaintiff proved that the ship was reported and ready to deliver her cargo on the 3d of *October*, and that the goods in question were landed by the defendants under the bill of lading on the 29th of the same month.

The first defence set up was, that no notice of the ship's arrival had been given to the defendants. But

GIBBS C. J. expressed himself clearly of opinion that no notice was necessary, and that it was the duty of the defendants, as indorsees of the bill of lading, to watch the ship's arrival.

1815.

 HARMAN
v.
CLARKE.

Witnesses were then called to shew that the ship had been improperly entered upon her arrival at the custom house, as she was there called *Die Treue*, whereas in the bill of lading she was denominated *The Treue*;—so that the defendants had been misled in their searches respecting her.

The difference between the ship's name in the entry and in the bill of lading was established. But it did not appear that the defendants had made the proper searches at the custom-house.

GIBBS C. J. said, that if the defendants, after using reasonable diligence, had been deceived as to the time of the ship's arrival, from her being entered by a different name from that given to her in the bill of lading, he should have thought the plaintiff had lost his right to demurrage; but that the facts were not proved on which that defence rested.

[161]

The plaintiff had a verdict for 48*l.*

Best, Serjt. and Campbell for the plaintiff.

Vaughan, Serjt. and Tindal for the defendant.

[Attorneys, *Lau less* and *Tomlinsons*.]

Vide *Leer v. Yates*, 3 Taunt. 387. *Jesson v. Sully*, 4 Taunt. 52.
Bessey v. Evans, ante, 131. *Harman v. Mant*, the next case.

1815.

HARMAN v. MANT and Others.

Although by the bill of lading the goods are deliverable to merchants in London, whose residence is well known, no notice to them of the ship's arrival is necessary to [162] render them liable for demurrage.

THIS was an action for demurrage, brought by the same plaintiff as in the last cause.

The only difference here was, that by the bill of lading the goods were consigned to Messrs. *Mant and Co.*, (the defendants) or their assigns.

It was proved on behalf of the defendants, that they are well known merchants, carrying on business on *Tower Hill*, and that it is usual in the continental trade, when a general ship arrives in the port of *London*, for the ship-broker to send notice of this to all the consignees named in the bills of lading; but the witness stated, that they considered this merely a courtesy, and that a similar notice is sent when the demurrage days begin.

Lens, Serjt. for the defendants insisted, that as they were named in the bill of lading, they were entitled to notice of the ship's arrival, and that till they had notice, the lay days as to them could not be considered as commencing.

Gibbs, C. J. It may be a very convenient practice to give notice to all the consignees of the ship's arrival; but I do not think that this is binding on the ship-master. The consignees are bound in point of law themselves to take notice when the ship arrives; and if they accept the goods under such a bill of lading as this, they make themselves liable for demurrage from the expiration of the lay days, calculated from the time of the ship's being ready to discharge her cargo.

Verdict accordingly.

Best, Serjt. and *Campbell* for the plaintiff.

Lens, Serjt. for the defendant.

[Attorneys, *Lawless and Druce*.]

Vide *Harman v. Clarke*, the preceding case.

1815.

BUXTON v. LAWTON.

BEST, Serjeant, moved on behalf of the defendant, to put off the trial of this cause, which was an issue directed by the Lord Chancellor.

Shepherd S. G. contrà, insisted that the application to put off the trial could only be made to the Lord Chancellor, who had directed the issue, and specified in his order when it should be tried.

An application may be made to a judge at Nisi Prius, to put off the trial of an issue directed by the Lord Chancellor.

GIBBS, C. J.—The cause being entered, and the record coming down to Nisi Prius, I am in possession of it, as of any other cause, and I cannot refuse to listen to an application by the defendant to put off the trial.

GOODSON and Another v. BROOKE.

Wednesday,
March 1.**A**CTION on a policy of insurance, and on an award.

The policy was subscribed for the defendant by one *Baines* as his agent. A loss having happened, *Baines* on behalf of the defendant agreed to refer the matter to arbitrators; who afterwards awarded, that the underwriters should pay 75*l* 14*s*. 4*d*. per cent., the amount now claimed. There was no direct proof of *Baines*'s authority to agree to the reference; but it appeared that he was in the habit of settling losses for the defendant, which the latter afterwards paid.

An agent
who under-
writes and
[164]
settles
losses for
another,
has an im-
plied autho-
rity from
him to re-
fer a dispute
about a loss
to arbitra-
tion.

GIBBS, C. J. held that this was sufficient evidence of agency to render the award binding on the defendant; and the plaintiff had a verdict.

* I was not myself present at the trial of this or the next cause. The notes were furnished to me by a friend at the bar.

1815.

Wednesday,
March 1.

STEVENS v. JACKSON and Another.

A person is liable as acceptor of a bill of exchange, which was drawn while he was an infant, but was accepted by him

[165] after he came of age.

A trader on being arrested for debt is sick in bed, and so ill that he cannot be removed to gaol without endangering his life: He is therefore allowed to remain some time in his own house, and then carried to gaol, where he remains till the expiration of two months from the date of his first arrest.

Held that this was a sufficient lying in prison under 21 Jac. 1. c. 19. s. 2. to constitute an act of bankruptcy.

THIS was an action by a bankrupt against his assignees to try the validity of his commission, which he sought to set aside, 1st, on the ground that there was no good petitioning creditor's debt; and 2dly, that he had not committed any act of bankruptcy.

1. It was proved that the plaintiff had accepted a bill of exchange for 150*l.* payable to the petitioning creditors. He was an infant when the bill was drawn, but he had attained his full age before he accepted it.

GIBBS, C. J. held, that the acceptance was binding upon him, and constituted a good petitioning creditor's debt.

2. On the 27th August 1814, a sheriff's officer, to whom a warrant was directed under a writ against the plaintiff, went to his house to arrest him. He was then lying sick in bed, and could not be removed without endangering his life. The officer made the caption immediately, but allowed him to remain in his own house till he was sufficiently recovered to be carried to prison. He was then removed to prison accordingly, and remained there till the 28th of October.

GIBBS, C. J. held, that this was a sufficient lying in prison two months after the arrest to constitute an act of bankruptcy within 21 Jac. 1. c. 19. s. 2.

Verdict for the defendants. (a)

* See note to last case.

(a) But if a trader on being arrested, is allowed to go at large, and then returns into custody, the act of bankruptcy has reference only to the latter event. *Barnard v. Palmer*, 1 Campb. 509. Vide *Ross v. Green*, 1 Burr. 437. *Came v. Coleman*, 1 Salk. 109. *Tribe v. Webber*, Bull. N. P. 38.

1815.

DOWELL v. MOON.

THIS was an action on a policy of insurance on the ship *Marian*, "at and from any port or ports, place or places not excepted in this policy or the rules of the *British Association* ;—beginning the adventure upon the said ship at "12 o'clock at noon of the 15th February 1813, until 12 o'clock "at noon of the 15th day of February 1814." The ship was valued at 3200*l.* The policy contained the usual liberty to sue, labour, and travel,—concluding with the words, "to the charges whereof we "the assurers will contribute each one according to the rate and "quantity of his sum herein assured." There was a receipt for the premium in the common form, at and after the rate of 18 guineas *per cent. per annum.* At the bottom there was a warranty against averages under particular circumstances, and against the ship's trading to or from certain enumerated places, together with a memorandum stating, that in case the ship should be lost or sold, the assured was to contribute and pay his proportional share of such losses, averages, &c., as should happen to the ships underwritten by the secretary for his account three days after the day on which the said ship might be lost or sold, and no longer.

A policy in the common form by an insurance club, where the members are not responsible for the solvency of each other, is valid, although the sums which they respectively insure are not specified on the face of the policy.

On the other side of the policy, were a number of printed [167] regulations, with the following title :

" British Association :

" The several ship-owners hereunder written do severally "and respectively, but not jointly or in partnership, nor the "one for the other of them, but each of them, only in his own "name, hereby mutually agree with each other, to insure their "respective ships; to commence on the day of at "noon, and to end on the 15th day of February 1814 at noon; "and do declare that the following rules and regulations "govern them."

1816.

DOWELL

MUN.

There was then in the handwriting of the Secretary "3000/- per Thomas Knaggs, attorney. Three thousand pounds pm. "Rd. 19th February 1813." On the third page of the policy the names of the members to the number of 72 were subscribed by Knaggs, under a power of attorney from each of them; but no sums were written opposite to any of the names.

The defence in this case was rested on the invalidity of the policy.

[168]

Shepherd S. G. and *Holroyd* for the defendant contended, that the insurance was contrary to 6 Geo. 1. c. 18. They particularly urged the omission on the policy of the sums for which the defendant and the other members were liable. The body of the policy mentioned, "that the assurers would contribute each one according to the rate and quantity of his sum therein assured," and that sum was no where specified.

GIBBS C. J. I shall hold this policy to be valid. The members of the association cautiously guard against any joint liability. According to the terms of their agreement, if when a loss happens any of the members are insolvent, the owner of the ship which is lost has no claim for their share of the contribution upon the other parties to the policy. Thus, for each portion of the sum insured, there is only the separate responsibility of a single underwriter, in the same manner as if the policy were subscribed at *Lloyd's* coffee-house, by a number of unconnected individuals. The meaning in this policy of the words, "according to the rate and quantity of his sum herein assured," I think is—according to the sum for which the members are themselves assured; for that fixes the proportion in which they contribute to any loss. As the aggregate of all the sums insured by the association, is to the sum for which each member is insured; so shall the amount of the loss be, to his contribution. The result certainly is unknown till the loss actually happens, and the sum which each member insures upon each ship, neither is nor can be specified in the policy. But the whole sum insured upon the ship is fixed when the policy is effected; the names of the

assurers are enumerated, and when a loss accrues, the proportions in which they are to contribute can be exactly ascertained." I think this is the same as if the sums were originally affixed to the names upon the policy. *Certum est quod certum reddi potest.*

1815.

DOWELL
MASON.

The plaintiff had a verdict.

Best, Serjt. and Abbott for the plaintiff.

Shepherd S. G. and Holroyd for the defendant.

Vide *Harrison v. Miller*, 7 T. R. 340. n. *Lees v. Smith*, 7 T. R. 338.

LAING and Another v. FIDGEON and Another.

A SSUMPSIT.

The declaration stated, that in consideration that the plaintiffs would purchase from the defendants a quantity of saddles, the defendants undertook they should be of a merchantable quality.

The plaintiffs transmitted to the defendants, saddle manufacturers at *Birmingham*, an order for 50 saddles, to be charged about 28s. each, and to be delivered at a wharf in *London*, for the purpose of being shipped to *Prince Edward's Island*. The defendants sent to the plaintiffs two saddles by way of pattern, and delivered the rest at the wharf, charging for them 26s. a piece. They were shipped without the plaintiffs having an opportunity of seeing them. Upon their arrival at *Prince Edward's Island*, they were found to be much inferior to the pattern saddles, and quite unsaleable without being re-stuffed and relined.

Where goods are ordered of a manufacturer in *England* to be exported to a foreign country, and the purchaser has no opportunity of seeing them before they are shipped, there is an

[170] implied undertaking on the part of the manufacturer that they shall be of a merchantable quality.

1815.

LAING
FIDGEON.

Vaughan, Serjt. for the defendants contended, that however they might be chargeable as for a fraud, there was here no evidence to support an action of assumpsit on the supposed promise that the goods should be of a merchantable quality. But

GIBBS C. J. held that the action well lay;—and the plaintiff had a verdict.

Shepherd S. G. and *Campbell* for the plaintiffs.

Vaughan, Serjt. and *Reader* for the defendants.

[Attorneys, *Jackson* and *Swan* and *Co.*]

Vide *Gardiner v. Gray*, ante, 144.

[171] **WILKINSON, Assignee of Gwynne, a Bankrupt, v. CLAY and Others.**

Insurance brokers holding a policy on which a loss has happened, come to a general settlement of their account with one of the underwriters, including his subscription to this policy, and for the balance found due,

THIS was an action for money had and received.

In the year 1809, the defendants, with a person of the name of *Dimsdale*, since deceased, were insurance brokers under the firm of *Dimsdale and Clay*, and they effected a policy for *Gwynne*, on the ship *Harriet*, which was subscribed by an underwriter of the name of *Aguilar*, for 500*l.* A total loss happened after *Dimsdale* had retired from the business. On the 14th of June 1810, *Aguilar* adjusted the loss, and on the 14th of July following the defendants settled the general underwriting account between him and *Dimsdale and Clay*, in which they took credit for his subscription of 500*l.* upon the which was rather less than that amount, take a bill of exchange from him at three months, but without erasing his name from the policy: This bill they retain in their own possession, and on the underwriter's becoming bankrupt, prove it upon his estate as a debt due to themselves: — Held that under these circumstances, they were liable to the assured for the amount of the subscription.

Harriet. There appeared a balance in their favour of 494*l.* For this *Aguilar* accepted a bill of exchange at three months which they drew upon him, payable to *Dimsdale and Clay*. After *Dimsdale* retired, they continued the business under the firm of *Sanderson and Clay*, and at the time of this settlement, *Aguilar's* account with the new firm was good for 3 or 400*l.* *Aguilar* soon after became bankrupt, and by subsequent losses the defendants were his creditors to a similar amount. They never handed over the bill of exchange to *Gwynne*, nor did it appear that they gave him any notice they had taken it; but it was shewn, that after *Aguilar's* bankruptcy, *Gwynne*, with reference to his subscription on the *Harriet*, frequently inquired what dividend his estate would pay. Mr. *Sanderson*, one of the defendants, proved the balance due to them under *Aguilar's* commission, swearing that they had no security for the same, save the above bill of exchange for 494*l.* They paid to *Gwynne* the difference between the amount of the bill of exchange and the 500*l.*, together with his proportion of the dividend they had received, leaving a deficiency of 290*l.* At the time of the settlement, when the bill was given, *Aguilar's* initials to the adjustment were struck through; but his name was allowed to remain on the policy, although the subscriptions of the other underwriters who had actually paid the loss, were cancelled.

Best, Serjt. insisted, that the last circumstance completely distinguished this case from *Andrew v. Robinson*, 3 Campb. 199., and that the inquiries made by *Gwynne* respecting *Aguilar's* dividend, shewed that he elected to consider him as his debtor,—after which, he could not resort to the insurance brokers. *Ovington v. Bell*, Campb. 237.

Gibbs, C. J. held, that the defendants were clearly liable, having taken a bill of exchange at three months for the general balance of their account; having kept that bill in their own hands; and having afterwards proved a debt under *Aguilar's* commission as due to themselves, which included the sum now sought to be recovered.

The jury inquired whether the defendants could be supposed to have taken the debt upon themselves, when they had al-

1815.

WILKIN-
SON
v.
CLAY:

[172]

[173]

1815.

WEEKIN,
SC.
v.
CLAY.

lowed *Aguilar's* name to remain on the policy, so as to leave the assured a remedy against him. But

His Lordship said, the defendants could not be discharged from their liability under such circumstances, by omitting to erase the underwriter's name from the policy, while it was in their hands.

The plaintiff had a verdict for 290/-.

Shepherd S. G. and Campbell for the plaintiff

Best and Vaughan, Serjts. for the defendants

[Attorneys, *Swin and Co.* and *Blunt and Houman*]

[174]

CHIPPENDALE v. MASSON and Others.

Where several defendants appear by separate attorneys and have separate counsel, if they are in the same interest, only one counsel can be heard to address the jury, and the witnesses are to be examined by one counsel on the part of all the defendants, in the same manner as if the defence were joint.

THIS was an action to recover the value of certain stores supplied to the *Northumberland East Indianaman*

Masson pleaded his bankruptcy, which was admitted

The two other defendants, who pleaded the general issue, appeared by separate attorneys and had separate counsel, but they relied upon the same ground of defence, viz. that the plaintiffs had taken a bill of exchange for the amount from *Masson*, the ship's husband, and had given him credit individually after the bill was due, so as to discharge the other owners of the ship.

The point arising whether the counsel for the different defendants had severally a right to cross-examine the witnesses, and to address the jury,

Gibbs, C. J. said, the interest of the defendants being the same, I can only hear one counsel. This is the rule I received

from a judge of whom no one can speak without respect, and almost reverence; I mean my very learned and excellent predecessor, Chief Justice Mansfield. By this rule I will abide. It cannot be left in the power of a number of defendants, whose interests are precisely the same, by separating in their defences to make 20 causes out of one. I consider it a remote possibility that such an attempt should be made; but rules of practice must be framed with a view to enforce the regular and decorous conduct of judicial business. I therefore consider it as established, that where several defendants in the same interest defend separately, the counsel who happens to be senior, and he alone, can address the jury. The witnessses are to be examined by the counsel successively, in the same manner as if the defence were joint and not separate.

1815.

CHIPPEN-
LE
v.
MASSON.
[175]

Lens, Serjt. and Littledale for the plaintiff.

Shepherd S. G., Vaughan, and Bosanquet, Serjts. for the defendants.

[Attornies, *Shepherd and Weston.*]

LANGSTON and Others v. CORNEY and Others.

[176]

THE plaintiff's declared in the usual form as indorsees, against the defendants as acceptors, of a bill of exchange for 1500*l.* drawn by *Hughes and Co.*

The defendants had effected a policy of insurance in their own names for the drawers of the bill, who were resident in the *Isle of France*. A loss happened, but the underwriters

Agents in England effect a policy of insurance for a correspondent abroad, on which a loss happens: He draws a bill upon them, which is presented to them for acceptance by the indorsee: They say they cannot accept it, having no funds in hand, but that on a settlement with the underwriters it shall be paid: The agents receive from the underwriters a sum less than the amount of the bill: Held that this might be recovered from the agents by the indorsee, as money had and received to his use.

If there be a conditional promise to pay a bill of exchange presented for acceptance, after the condition has been performed, this cannot

be declared upon as an absolute acceptance of the bill.

CASES AT NISI PRIUS

1816.

LANGSTON
CORNEY.

refused to settle it, on the ground that the voyage was illegal. The bill of exchange was presented for acceptance to the defendants, first by a person of the name of Stewart, who then held it as indorsee, and afterwards by the plaintiffs; upon which occasions, the defendants said they could not then accept the bill, as they had no funds of the drawers in their hands, but that as soon as the underwriters had settled the loss, it should be paid. The plaintiffs now proved that upon a submission to arbitration, the arbitrator had awarded that the underwriters were liable, and that the defendants had received upon the policy 890*l.* beyond all charges and expences.

[177]

It was contended, that under these circumstances the defendants were liable as acceptors of the bill, the condition on which they promised to pay it having been fulfilled, and therefore the case stood the same as if there had been an absolute promise to accept, which has been often held to amount to an acceptance.

GIBBS C. J.—It is alleged in the declaration, that the defendants accepted the bill of exchange according to the custom of merchants. What is proved amounts only to a conditional acceptance; and it has never been held that a conditional acceptance can be declared upon as an absolute one. I am therefore of opinion that the plaintiffs cannot recover upon the bill. (a)

The count for money had and received was then relied upon. The defendants proved that since the promise to pay to the plaintiffs, other parties had set up a claim to the money in their hands, as being interested in the insurance, and that it had been attached by process out of the Lord Mayor's Court. However—

GIBBS, C. J. thought the 890*l.* might well be recovered by the plaintiffs as money had and received to their use. The promise to pay while they were indorsees of the bill, consti-

(a) Vide *Pierson v. Dunlop*, Cowp. 571. *Anderson v. Hick*, 3 Campb. 179.

AFTER HILARY TERM, 55 GEORGE III.

tuted a sufficient privity between them and the defendants. To the attachment, the defendants might plead *nil habent* or *nil debent*. At any rate, if they should be * liable to other parties, that would be no discharge of the liability they contracted by their promise to the plaintiffs.

*1815.

LANGSTON
v.
CANNY.
[*178]

Verdict accordingly.

Shepherd S. G., Best Serjt., and Gaselee for the plaintiffs.

Lens Serjt. and *Campbell* for the defendants.

[Attorneys, *Gregson* and *Blunt* and *Bowman*.]

Vide *Favenc v. Hullett*, 1 Campb. 557.

C A S E S

ARGUED AND DECIDED

AT

NISI PRIUS

IN

THE COURT OF KING'S BENCH,

At the Sittings after

Easter Term,

In the Fifty-fifth Year of GEORGE III. 1815.

FIRST SITTINGS AFTER TERM AT WESTMINSTER.

Thursday,
May 11.

OUTHWAITE and Another v. LUNTLEY.

The alteration of a bill of exchange by the drawee after it has been drawn and indorsed, and before it is accepted, postponing the time of payment, renders the bill void.

THIS was an action by the indorsees against the indorser of a bill of exchange for 316*l. 8s. 5d.* dated 15th March 1814, drawn by O. and S. upon K. and Co., payable to the order of the drawers at three months after date.

The defence was, that the bill had been vitiated by an alteration.

It appeared that after the bill had been drawn and indorsed by O. and S., it was left for acceptance with K. and Co., the

drawers. It was then dated 5th *March*. Without the consent of the drawers, they altered the date to the 15th, and then accepted it.

181.

OVER-
WALL
v.
LUNILEY.

Park for the plaintiffs contended that this alteration did not vitiate the bill. Until acceptance it was not a perfect bill, and could not be considered as negotiated. Besides, the alteration here was evidently for the advantage of the drawers, as it gave further time to provide for the bill, and their consent to it might be implied.

Lord ELLENBOROUGH.—Before acceptance the bill of exchange was a perfect instrument, on which the drawers might have been sued. Any material alteration of it in that state, therefore, rendered it void. It is impossible to say that postponing the time of payment is always advantageous to the parties liable on the bill. Without my knowing it, I may thus be out of *England* at the time when a bill I drew becomes payable and is dishonoured, and thus having made no provision for it, from the belief that it was duly honoured some time before, this postponement may cause the ruin of my credit. Besides, consent would not justify the alteration with a view to the stamp laws, after the bill had been negotiated.

Plaintiffs nonsuited.

Park and Andrews for the plaintiffs.

[181]

Garrow A.G. for the defendant.

[Attorneys, *Allingham and Burt.*]

S. P. decided by K. B. in *Johaston v. Gibbs*, T. T. 1815. See cases collected, *Bayley on Bills*, last ed. 42, 43, 44, 45.

~~181.~~Thursday,
May 11.

LÖESCHIAN v. WILLIAMS.

Although goods are delivered at the packer's of the purchaser, he having no warehouse of his own, if they were to be paid for in ready money, and this was intimated to the packer when he received them, they may still be stopped in transitu.

TROVER for a piano-forte.

The plaintiff is a manufacturer of piano-fortes. A Captain *Landey*, ordered one of him for exportation, which was to be delivered at the house of the defendant, who is a packer, and was to be paid for in ready money. The plaintiff's servant delivered the piano-forte at the defendant's, and demanded the money. The answer was, that *Landey* had given no orders for that purpose, and that the defendant was from home. The servant stated that the piano-forte was to be paid for before it was delivered, and, upon that understanding, left it at the defendant's. The defendant afterwards refused to deliver it back, and shipped it for *Landey* without its ever being paid for.

[182]

Fuller for the defendant contended, on the authority of *Scott v. Petit*, 3 Bos. & Pull. 469., and *Dixon v. Baldwin*, 5 East, 175., that the action could not be maintained.

Lord Ellenborough.—Allowing that upon an absolute delivery of goods to the packer of the purchaser, who has no warehouse of his own, the transit is at an end, I think the plaintiff had a right to resume the possession of this piano-forte after it had been delivered to the defendant. That delivery was only conditional, and he remained a trustee for the plaintiff. It was a contravention of duty therefore to deliver it to the purchaser until it had been paid for.

Verdict for the plaintiff.

Garnow, A., G., and, Bolland for the plaintiff.

Fuller for the defendant.

[*Attorneys, Collingwood and Holt.*]

1815

ADJOURNED Sittings at Westminster.

CATLIN, Spinster, v. BELL.

Thursday,
May 11,

THIS was an action of assumpsit for not accounting for goods delivered by the plaintiff to the defendant, to be sold on her account.

The defendant is master of a ship trading from this country to the *West Indies*, and the plaintiff entrusted to him a quantity of millinery goods, which he undertook to sell for her there.

The first defence was, that these goods had paid no duty on exportation; and it was proved that the defendant's ship, in which they were carried, cleared out at the custom-house in ballast. It was contended, therefore, that the adventure was illegal, and that no action could arise out of it.

Lord ELLENBOROUGH.—You do nothing unless you shew that it formed part of the agreement between the parties to defraud government of the duties. This would contaminate the contract on which the action is founded; but it cannot be affected by the simple circumstance of the ship clearing out in ballast.

It was then stated, that the defendant not being able to sell the goods in the island to which they were destined, had sent them to the *Caraccas*, in search of a market, where they had been destroyed by an earthquake; but

Lord ELLENBOROUGH clearly said, that there being a special confidence reposed in the defendant with respect to the sale of the goods, he had no right to hand them over to another person, and to give them a new destination.

In an action for not accounting for goods delivered in this country to the defendant, the master of a ship, to be sold by him abroad, it is no defence that the goods were exported without paying duties, unless it be proved that the evasion of the duties was part of the agreement between the plaintiff and defendant.

If goods are delivered to *A.* to be sold by him in a particular place, although he

[184]
is unable to sell them there, he has no right to send them elsewhere, under the care of another person, in search of a market.

The plaintiff had a verdict.

[185]

Park and Barnwall for the plaintiff.COLLIN
W.
BELL.

Topping for the defendant.

[Attorneys, *Richardson and Lowes.*]See *Schmaling v. Tomlinson*, C. P., E. T. 55 Geo. 3.[185]
Friday,
May 12.

A demand being made by a seaman on the owner of a ship for wages, which had accrued during an embargo, he said, if others paid, he should do the same. Held that this was a sufficient acknowledgement to take the case out of the statute of limitations.

LOWETH v. FOTHERGILL.

THIS was an action for seaman's wages, alledged to have been earned during the *Russian* embargo in the time of the *Emperor Paul*, under the circumstances mentioned in *Beale v. Thompson*, 3 Bos. & Pull. 405. 4 East, 546.

The defendant relied upon the statute of limitations. To get rid of this, the plaintiff proved, that having applied for payment in the year 1813, the defendant said, if others in *Hull* (to which port the ship belonged) paid the seamen for the time the embargo lasted, he should do the same.

It was contended for the defendant, that this was no promise to take the case out of the statute, and that it was at any rate incumbent on the plaintiff to shew that others in *Hull* had paid.

Lord ELLENBOROUGH.—I think this amounts to an acknowledgement, on which the law implies a promise. The defendant did not say that he had paid the wages, and, on the contrary, he admitted that they were unpaid. He only expressed doubts on the law of the question, which has been finally decided against him.

Verdict for the plaintiff.

Brougham and *Tindal* for the plaintiff.

1815.

Garrow A. G. for the defendant.

LOWETH
".
FOTHER-
GILL.

[Attorneys, *Ashfield* and *Atkinson*.]

DELAMAINER v. WINTERINGHAM.

Friday,
May 12..

THIS, like the last, was an action for seaman's wages, during the *Emperor Paul's* embargo. The declaration contained several very special counts, stating all the circumstances;—with *indebitatus* counts for work and labour.

It was merely proved that the plaintiff had been hired for the voyage at monthly wages; that while at a *Russian* port, he and the rest of the crew were taken out of the ship, and marched into the country; that they were afterwards released and returned to the ship; that the plaintiff then continued on board till the conclusion of the voyage; and that she delivered her cargo and earned freight. The special counts were not supported by evidence. The plaintiff had been paid all his wages except for the time when he was imprisoned in *Russia*.

J. Parke for the defendant insisted, first, that the plaintiff could not recover at all without putting in the orders of the *Russian* government which had been proved, and very much relied upon, in *Beale v. Thompson*. In the absence of these, it did not appear what was the character of the embargo, or of the defendant's imprisonment, and there was nothing to shew that he was entitled to wages in that interval. At any rate, he could not recover these wages under counts for work and labour; for during the whole of the time in question he had been at a distance from the ship, and had done no service as a mariner.

Held, that on a count for work and labour, a seaman might recover for wages during a hostile embargo in a foreign port, while he was imprisoned on shore, on proof that the crew were restored to the ship, and that she completed the voyage and earned freight,

[187]
without producing the order by which the embargo was taken off.

Lord ELLENBOROUGH.—Upon the facts proved, I will presume that the embargo was of such a nature as not to put

1815.

*DEAL
MANER
WINTER-
INGHAM.*

an end to the contract between the master and owner of the ship, and the mariners. The plaintiff's return to the ship and the completion of the voyage, appear to me to remove all difficulty. Then, if the plaintiff is entitled to recover at all, it must be for work and labour. The action is maintainable on the ground that there was no severance of his services ; and therefore, in contemplation of law, he was working and labouring for the defendant, from the commencement to the conclusion of the voyage.

To Verdict for the plaintiff.

[*Brougham* and *Tindal* for the plaintiff.

J. Parke for the defendant.

[Attorneys, *Ashfield* and *Prosser*.]

[188]
Wednesday
May 17. .

REDHEAD and Another v. CATER.

A ship is not of the built of Russia within the meaning of the navigation act, which, having been originally constructed in another country, was wrecked on the coast of Russia and repaired, all the expence of more than two-thirds of her value.

IN this case the question arose, whether a cargo of *Russian* produce could be lawfully imported into an *English* port in a ship called the *Fraw Carolina*.

She was built originally in *Holstein*, and was wrecked on the *Russian* coast. However, her hull was got off, though very much damaged ; and she was repaired, being in a great measure constructed of new materials. The expence of the repairs exceeded two-thirds of her value. When this is the case, by the law of *Russia* the ship is considered *Russian*-built, and is entitled to sail under the *Russian* flag. Accordingly, a *Russian* register was granted to the *Fraw Carolina*, she was owned by a *Russian* subject, and she was navigated as a *Russian* ship.

though by the law of *Russia* she was under these circumstances to be considered a *Russian* ship, and although she afterwards had a *Russian* register, was owned by a *Russian* subject, and was navigated under the *Russian* flag,

Under these circumstances, it was contended, that the ship must be taken to be *Russian-built*, within the meaning of the navigation-act, 12 Car. 2. c. 18., so as to be entitled to import into this country a cargo of the growth and production of *Russia*. 1

1815.
REDHAD
CATER.

Lord Ellenborough.—I hold that *repair* is not *built*. A ship must be of the built of the place where she was originally constructed, and while her identity continues, it is impossible, in the nature of things, that the place of her built should ever be altered. The law of *Russia* cannot be of force to controul the navigation-act of *Great Britain*. The importation was certainly illegal.

[189]

His Lordship's decision upon this point was acquiesced in, but the case involved others, which were reserved for the opinion of the Court.

Garrow A. G., Lawes, and Gaselee, for the plaintiffs.

Scarlett, Abbott, and Littledale, for the defendant.

[Attorneys, *Boswell* and *Cooper*.]

Rex v. Marquis of BUCKINGHAM and Others.

*Thursday,
May 18.*

THIS was an indictment for not repairing *Edgeware Bridge*, which the defendants were charged with being bound to repair *ratione tenurae*.

The indictment alleged that this bridge was "used for all the liege subjects of our Lord the King, and his predeces- sors, with their horses, carts, and carriages, to go, return, pass, ride, and labour, at their free will and pleasure."

use the bridge at such times; and if an indictment for not keeping it in repair states that it is used by the King's subjects, "at their free will and pleasure," the variance is fatal

A bar across a public bridge kept locked except in times of flood, is conclusive evidence that the public have only a limited right to

[190]

1815.

Rex
v.
Marquis of
BUCKING-
HAM.

It appeared that, in point of fact, the bridge is parallel to the highway over a ford ; that there has always been a bar across the bridge, of which a person appointed by the lord of the manor of *Great and Little Stanmore* kept a key, and that it was only opened in times of flood, when the ford was dangerous or impassable.

The objection being made, that this evidence contradicted the right stated in the indictment,—

Park for the prosecution contended, that the bar did not prove a qualified right on the part of the public to use the bridge ; and that if it did, the statement in the indictment might be considered as adapted to it ; for the usual expression “at all times of the year” was not introduced, and the words “at their free will and pleasure” must mean, when need and occasion required.

[191]

Lord ELLENBOROUGH.—A bar kept shut, and opened as this is, I think conclusively shews that the public have only a right to use the bridge at times of flood. It is easy to see how such a qualified right might be created, and there is no objection to its legality.—But the indictment sets out a right without limit or qualification. I can give no other meaning to the words “at their free will and pleasure,” than that the public may at all times and seasons prefer crossing the bridge with their carts and carriages to passing the ford,—which it is proved they are not entitled to do. Therefore, although the defendants may be bound *ratione tenuræ* to maintain this bridge, to be used in times of flood, they must be acquitted upon the present indictment.

Not guilty.

Park and Gurney for the prosecution.

Scarlett, D'Oyly, and Richardson, for the defendants.

[Attorneys, *Stable and Lowndes*.]

Vide *Rex v. Northampton*; 2 M. & S. 262.

1815.

ADJOURNED Sittings at Guildhall.

BLUCK v. THORNE and Another.

Friday,
May 19.

THIS was an action by a bankrupt against his assignees, to try the validity of the commission. A notice was given under Sir S. Romilly's act to dispute the act of bankruptcy only.

The plaintiff having made out a *prima facie* case, the defendants' counsel produced the proceedings under the commission, from which they read the depositions to prove the trading and petitioning creditor's debt. They then called a witness to establish the act of bankruptcy, who had been examined before the commissioners.

Garrow A. G. for the plaintiff, having claimed the privilege to inspect this witness's deposition on the file of the proceedings, for the purpose of cross-examining him, and this being disputed on the other side, he insisted he had a right to it on two grounds; 1st, as the proceedings were documents of a public nature; and 2dly, as the whole must be considered to be in evidence, a part having actually been read to support the defendants' case.

Lord ELLENBOROUGH.—The proceedings are kept for the benefit of the creditors, and I know of no right to inspect them as public documents. Nor can I consider the whole as being in evidence because two depositions have been read. These might have been taken off the file, and read separately, in which case it could not be pretended that all the rest of the proceedings under the commission would have been in evidence; and it can make no difference that the two depositions when they were read, for the sake of convenience, were suffered to remain on the file. I must therefore hold that the right

In an action by a bankrupt against his assignees to try the validity of [192] the commission, where notice being given only to dispute the act of bankruptcy, the defendants read the two depositions on the file of the proceedings which prove the trading and petitioning creditor's debt, the residue of the proceedings are not to be considered in evidence, and the plaintiff's counsel has no right to inspect them.

1815.

**BLUCK
v.
THORNE.**
[*193]

claimed is at present inadmissible. The plaintiff may by and bye call * for the deposition if he pleases, and read it in evidence for the purpose of contradicting the witness.

The plaintiff was nonsuited.

Garrow A. G. and Gurney for the plaintiff.

1816

Park and Lawes for the defendant.

[Attorneys, *Bennett and Russen*]

Saturday,
May, 20.

HETHERINGTON v. KEMP.

It is not sufficient *prima facie* evidence of a letter being sent by the post, that it was written by a merchant in his counting-house, and put down upon a table for the purpose of being carried from thence to the post-office, and that by the course of

[194]
business in the counting-house, all letters deposited on this table are carried to the post-office by a porter.

THIS was an action on a bill of exchange; and the only question was, whether the defendant had received notice of its dishonour.

The plaintiff proved, that on the 14th of November, the day after it came due, he wrote a letter, addressed to the defendant, stating that it had been dishonoured; that this letter was put down on a table, where, according to the usage of his counting-house, letters for the post were always deposited; and that a porter carries them from thence to the post-office. But the porter was not called, and there was no evidence as to what had become of the letter after it was put down upon the table. A notice to produce the letter had been served upon the defendant.

Taddy for the plaintiff contended, that this was good *prima facie* evidence that the letter had been sent by the post.

Lord ELLENBOROUGH.—You must go farther. Some evidence must be given that the letter was taken from the table in the counting-house, and put into the post-office. Had you called the porter, and he had said that, although he had no recollection of the letter in question, he invariably carried to

the post-office all the letters found upon the table; this might have done; but I cannot hold this general evidence of the course of business in' the plaintiff's counting-house' to be sufficient.

1815.*
HEMFR-
INGTON
v.
KEMP.†

A letter was then put in from the defendant, in which he acknowledges the receipt of a letter from the plaintiff of the 14th of November, without referring to its contents; and Lord *Ellenborough* said he would presume this was the letter written to inform him of the dishonour of the bill.

The plaintiff had a verdict.

Taddy for the plaintiff.

Spankie for the defendant. ·

[Attorneys, *Nettleship* and *Nethersole*.]

Vide *Hagedorn v. Reid*, 3 Campb. 379.

SADLER, Assignee of KNIGHT, a Bankrupt, v. LEIGH and Another.

[195]
Saturday,
May 20th

THIS was an action of trover for the effects of the bankrupt taken under a *fi. fa.*

The first question which arose, was upon the petitioning creditor's debt.

The commission was sued out on the petition of *Sadler*, the plaintiff. He was a bacon-factor; and one *Harrison* sent him a quantity of bacon to be sold, by him on *Harrison's* ac-

count of the purchaser to his principal. But he ceases to be so, when the principal has agreed with him to consider the purchaser as his debtor, and has taken steps for recovering the debt directly from the purchaser

A factor who sells goods in his own name without a *det credere* commission, is a good petitioning creditor against the purchaser, although he has merely communicated the

1815.

SADLER
v.
LEIGH.

count. This bacon, to the value of above 100*l.* he sold to *Knight*, the bankrupt,—mentioning his own name alone as the seller in the invoice. He afterwards rendered account-sales of the bacon to *Harrison*, in which he mentioned the name of *Knight* as the purchaser. According to the mode of dealing between *Sadler* and *Harrison*, the latter drew upon the former from time to time for the proceeds of the bacon sold. *Harrison* had not been paid for any part of the parcel in question, either by *Sadler* or by *Knight*. *Sadler* did not guarantee the solvency of the purchasers.

[196] *Park* for the defendant contended that, under these circumstances, *Sadler* was not a good petitioning creditor. No debt was due from the bankrupt to him.

The moment the name of the purchaser was mentioned to the principal, the functions of the factor had ceased. There being no *debet credere* guaranteee, the loss, on the purchaser's insolvency, was the loss of the principal, and the principal alone could be considered the creditor.

Lord ELLENBOROUGH.—Upon these facts, I think *Sadler* was a good petitioning creditor. He sold the goods in his own name, and he alone was known to *Knight*, the purchaser, throughout the whole transaction. He might, therefore, have maintained an action against *Knight* for goods sold and delivered to recover the price. Thus having a legal debt due to him, it follows that he may sue out a commission of bankrupt against the debtor.

It was afterwards proved, however, that before the commission was sued out, there had been a communication upon the subject between *Harrison* and *Sadler*, when the former agreed to consider *Knight* as his debtor, and took steps for recovering the debt directly from him.

[197] **Lord ELLENBOROUGH.**—This last fact I think, is fatal to the petitioning creditor's debt. After the intervention of the principal, the right of the factor to sue was gone. The debt was then due to the principal in the same manner as if the sale had been made personally by him in the first instance.

However, although His Lordship said he had no doubt upon the point, he agreed to reserve it; as it went to overset the commission. (a)

1815.¹SADLER
" LEIGH.

Upon the merits, it appeared that the sheriff seized the goods under the *si. fa.* on the 3d of November, at five o'clock in the afternoon ; and that the bankrupt committed an act of bankruptcy, by being denied to a creditor at seven the same evening.

Lord ELLENBOROUGH held, that under these circumstances, where the execution and act of bankruptcy were on the same day, it was open to inquire which had the priority, and that in this case, if no act of bankruptcy was proved before five, the action could not be maintained.

An attempt was made to prove an act of bankruptcy, by a departure from the dwelling house at seven in the morning of the 3d of November : but

Where goods are seized under a *si. fa.* the same day that the party commits an act of bankruptcy, it is open to inquire at what time of the day the goods were seized, and the act of bankruptcy was committed ; and the validity of the execution depends upon the priority.

The jury found for the defendants.

Garrow A. G. and *Barnewall* for the plaintiff.

[198]

Park and *Puller* for the defendants.

[Attorneys, *Hore* and *Noy.*]

(a) Vide *Drinkwater v. Goodwin*, Cowp. 251. *Favenc v. Bennett*, 1*East*, 36. *Atkyns v. Amber*, 2*Esp. Rep.* 493.

1815.

*Tuesday,
May 23.***BECK and Wife v. DYSON.**

In an action on the case for keeping a dog which bit the plaintiff, it is not sufficient to shew that the dog was of a fierce and savage disposition, and usually tied up by the defendant, and that the defendant promised to make a pecuniary satisfaction to the plaintiff, after

[199]
had been bit
by the dog.

CASE for keeping a dog, which bit the plaintiff, Mrs. Beck.

She had been dreadfully bit and lacerated by this dog ; and the question was, whether there was sufficient evidence of his being accustomed to bite, and of this being known to the defendant.

It was proved that the dog was of a fierce and savage disposition ; that the defendant generally kept him tied up, and that Mrs. Beck having been bit by him, the defendant promised to make her a pecuniary recompence ; but there was no proof of his having before bit any other person.

It was submitted, that from these circumstances the jury would be warranted in inferring that the dog was accustomed to bite within the knowledge of the defendant. But

Lord ELLENBOROUGH held the evidence insufficient, and directed a

Nonsuit.

Garrow A. G. and Adolphus for the plaintiffs.

Knowlys C. S. for the defendant.

[Attorneys, *Dawson* and *Ledwick*.]

1815.

COURT OF COMMON PLEAS.

SITTINGS AT GUILDHALL

PRIOR v MITCHELL

Monday,
May 22,

THIS was an action by the indorsee against the maker of a promissory note in the following form

“ £50.

London, July 16, 1814.

“ Six months after date I promise to pay to Mr Thomas Royston, or order, fifty pounds, for value received

“ David Mitchell.

“ At

“ Messrs Vere, Smart, and Co

“ 77, Lombard Street,

“ London

If a place of payment is mentioned in the margin, or at the foot, of a promissory note, this is no part of the contract, but a mere memorandum; and in an action on the note, there is no occasion to prove that it was presented there for payment

The plaintiff proved the hand-writing of the defendant as maker, and of Royston as indorser of the note, and there rested his case

BEST SERJEANT for the defendant, contended, that it was necessary to prove that the note, when due, had been presented for payment at *Messrs Vere, Smart, and Co's*, and referred to the accent decisions in which the place where a bill or note is payable has been held to be a part of the contract

[201]

GIBBS C J—I am of opinion that the words at the foot of this promissory note, are only a memorandum where payment may be demanded. Had they been inserted in the body of the note, they certainly would have formed a part of the contract, and evidence of a presentation for payment at *Vere, Smart, and Co's* would have been necessary to charge the defendant. I find this distinction taken in *Bayley on Bills*, last

1815. edition, p. 96. "If a note be made payable at a particular place, and that place be mentioned in the body of the note,
 PRICE " presentment for payment must be made at that place: but
 MITCHELL. " where the place is mentioned in the margin, it does not
 " appear that such presentment is necessary." Several cases
 are referred to, which seem to sanction the distinction. Indeed,
 where the direction to the place of payment is mentioned
 in the margin, or at the foot of the note, (as here,) the in-
 spection and perusal of the instrument, I think, shew that
 this was not intended to be any condition to the absolute pro-
 mise to pay contained in the body of the note.

His Lordship refused to save the point, and the plaintiff had a verdict.

[202] *Lens Serjt. and Bolland* for the plaintiff.

Best Serjt. and Comyn for the defendant.

[Attornies, *Cater and Drew.*]

Vide *Saunderson v. Judge*, 2 H. Bl. 509. *Sanderson v. Bowes*, 14 East, 500. *Wild v. Rennards*, 1 Campb. 425. *Callaghan v. Aylett*, 2 Campb. 551.

COURT OF KING'S BENCH.

Sittings at Guildhall in Hilary Term, 1815.

Hunter v. Potts.

Feb. 1.

THIS was an action on a policy of insurance on goods by the ship *Rebecca*, at and from *London* to *Honduras*, with leave to touch at *Antigua*, and discharge and take in goods.

The 1st count laid the loss by the perils of the seas. The 2d count alleged, that whilst the ship was sailing and proceeding with the goods on board thereof upon her said voyage, and before her arrival at *Honduras*, and during the course of the said voyage, to wit, on the 25th day of *February* 1804, the said ship and the goods so on board thereof, were by certain perils, losses, and misfortunes, which came to the hurt, detriment, and damage of the said goods and the said ship, broken, spoiled, injured, lost, and destroyed, and the said goods thereby became and were wholly lost to the proprietors thereof, to wit, at &c.

It appeared that the ship, having touched at *Antigua*, was detained there for a considerable time by the sickness of the crew, and that while she lay at that Island, the rats, which had increased to a great extent, eat holes in her transoms, and other parts of her bottom. In consequence, a survey was called, and she was found so much injured, that she was unfit to proceed to *Honduras*. She was therupon condemned, and the cargo was sold. The plaintiff sought to recover a loss of 64*l.* 16*s.* 6*d.* *per cent.*

A loss arising from rats eating holes in the ship's bottom is not within the perils insured against by the common form of a policy of insurance.

[204]

* By mistake this case was omitted to be inserted in its proper order.

1815.

HUNTER
v.
POTTS.

Lord ELLENBOROUGH, however, was clearly of opinion, that this was not a loss within any of the perils insured against, and

The plaintiff was nonsuited.

Garrow A. G., Park, and Puller, for the plaintiff.

Topping and Richardson for the defendant.

[Attorneys, *Crowder and Co.* and *Dennette and Co.*]

So if a ship be destroyed by worms, this is not a loss for which the underwriters are liable. *Rhol v. Parr*, 1 Esp. Rep. 444.

C A S E S

ARGUED AND DECIDED

AT

NISI PRIUS

IN

THE COURT OF KING'S BENCH,

At the Sittings in and after

Trinity Term,

In the Fifty-fifth Year of GEORGE III. 1815.

SITTINGS IN TERM AT GUILDHALL.

PENN v. BENNET, Gent. one, &c.

INDEBITATUS assumpsit for goods sold and delivered.
General plea of bankruptcy, concluding to the country.

It was admitted that the defendant prior to his bankruptcy, was indebted to the plaintiff in the sum of 10*l.*, for carpets supplied to him, and that he afterwards obtained his certificate.

The plaintiff relied on a subsequent promise to pay the debt.

the plaintiff must declare specially, and prove the condition performed.

If a bankrupt promises absolutely to pay a debt barred by his certificate, indebitatus assumpsit lies against him on the original consideration ; but if he only promises conditionally,

1815.

^{PENN}
~~v.~~
BENNET.

There was considerable doubt upon the evidence, whether in point of fact the defendant had absolutely promised to pay the debt, or only upon condition that he received certain bills of exchange which he expected for goods he was about to sell.

The defendant's counsel contended, that at all events it was incumbent on the plaintiff to have declared specially, and that the certificate was a bar to the original promise stated in the *indebitatus counts*.

Lord ELLENBOROUGH.—If the jury shall be of opinion that the defendant's promise after his bankruptcy was only conditional, then I think the present action cannot be maintained. The plaintiff in that case ought to have declared specially, and to have proved that the condition was fulfilled. But if the promise was absolute, I am of opinion that the plaintiff upon this record is entitled to a verdict. The debt still subsists notwithstanding the certificate, and is a sufficient consideration for a promise by the bankrupt to pay it. Therefore, if after he has obtained his certificate he makes such a promise, the certificate can be no bar. It is not true that the cause of action mentioned in the declaration accrued to the plaintiff after the defendant became bankrupt, as he has stated in his plea.

The jury found a verdict for the plaintiff.

[207] *Park* and *Adolphus* for the plaintiff.

Garrow A. G. and *Puller* for the defendant.

[Attorneys, *Isaacs* and *Bennett*.]

Vide *Truelman v. Fenton*, Cowp. 544. *Bailey v. Dillon*, 2 Burr. 736. *Besford v. Saunders*, 2 H. Bl. 116. *Williams v. Dyde*, Peak. N. P. Cas. 68.

1815.

FIRST Sittings AFTER TERM AT WESTMINSTER.

RICHMOND v. HEAPY and Another.

Thursday,
June 15.

THIS was an action of trover brought by a bankrupt against his assignees, to try the validity of the commission. Plea, not guilty.

The plaintiff made out a *prima facie* case against the defendants; and for the purpose of putting them upon strict proof of the trading, petitioning creditor's debt and act of bankruptcy, proved that at the same time when the issue was delivered with notice of trial on the back of it, a notice was served intimating that these matters were to be disputed.

It was objected that this notice came too late, as 49 Geo. 3. c. 121. s. 10. requires that it shall be given by the plaintiff "before issue joined."

In an action against the assignees of a bankrupt, a notice to dispute the bankruptcy served at the same time when the issue is delivered with notice of trial on the back of it, is not sufficient under [208]
49 G.3.
c. 121. § 10.

The other side contended that till the issue was delivered, issue was not joined within the meaning of the act of parliament, and that great inconvenience would follow from any other construction.

Lord ELLENBOROUGH.—I must be governed by the enactment of the legislature. Now 49 Geo. 3. c. 121. s. 10. expressly enacts that the proceedings shall be evidence to be received of the petitioning creditor's debt, &c., unless the other party, if plaintiff, before issue joined in the action, give notice in writing that he intends to dispute such matters. The notice to dispute the bankruptcy was given in the present case at the same time with the notice of trial. Was this before issue joined? Issue must have been joined before notice of trial could be given, and a subsequent notice is ineffectual.

1815. The proceedings were accordingly read, and *prima facie* supported the commission. But evidence was afterwards adduced in reply to impeach the petitioning creditor's debt, and the plaintiff had a verdict.

[209] *Garrow A. G. and Marryat* for the plaintiff.

Topping and Comyn for the defendants.

[Attorneys, *Shirrow and Cobb.*]

49 Geo. 3. c. 121. § 10. enacts, "That in any action now brought or hereafter to be brought by or against any assignee of any bankrupt, the commission of bankrupt, and the proceedings of the commissioners under the same, shall be evidence to be received of the petitioning creditor's debt, and of the trading and bankruptcy of such bankrupt, unless the other party in such action shall, if defendant, at or before the time of his pleading to such action, and if plaintiff, before issue joined in such action, give notice in writing to such assignee that he intends to dispute such matters, or any of them."

1815.

FIRST Sittings AFTER TERM AT GUILDHALL.

FREEMAN v. JACOB.

Friday,
June 16.

THIS was an action on a bill of exchange, dated *Constantinople*, 10th *August* 1814, drawn by *A. B. Jacob* upon the defendant, payable to *P. Phillips* or order at 60 days after sight, and indorsed by him to the plaintiff.

The declaration, after stating the drawing of the bill on the 10th of *August* in the usual form, averred that afterwards, to wit, on the same day and year aforesaid, the defendant accepted the bill of exchange upon sight thereof.

In point of fact the bill was not accepted or presented for acceptance till the 19th of *September*, and therefore did not become due till the 21st of *November*.

It was contended that this was a fatal variance. The day when a bill payable after sight is accepted is material, and must be considered as part of the description of the instrument. The mistake in this case makes a difference of 40 days with respect to the time when the bill becomes due and the liability of the defendant attaches.

Lord ELLENBOROUGH—I think the day of acceptance immaterial, and it is laid under a *videlicet*. The bill was due before action brought.

Verdict for the plaintiff.

Park and Taddy for the plaintiff.

Garrow A. G. and Lawes for the defendant.

[Attorneys, *Tomlinsons* and *Collins*.]

Vide *Russell v. Langstaff*, Doug. 514. *Young v. Wright*, 1 Campb. 139. *Coxon v. Lyon*, 2 Campb. 307. *n.*

In declaring against the acceptor of a bill of exchange payable a certain time after sight, the day of accepting [210] the bill laid in the declaration under a *videlicet* is immaterial.

1815.

ADJOURNED Sittings at Westminster.

Saturday,
June 17.

TROTMAN v. DUNN.

Where *A.* having summoned *B.* his master, before a Court of Conscience for wages, *B.* there utters words imputing felony to *A.*— if this charge be necessary to *B.*'s defence no action can be maintained against him by *A.* for defamation : *aliter*, if the words are spoken maliciously, though addressed to the Court.

ACTION for saying of the plaintiff " He has been transported before, and ought to be transported again. He has been robbing me of nine quartern loaves a week."

Pleas, the general issue, and a justification that the words were true.

It was allowed that the plaintiff had been formerly convicted at the *Old Bailey*, and transported for seven years. On his return he had served the defendant as a journeyman baker, and was suddenly dismissed by him. He then claimed a week's wages, and to enforce this demand, summoned the defendant before the Court of Conscience. While they were attending there, the words mentioned in the declaration were spoken ; but it did not appear distinctly in what stage of the proceedings they were spoken, or to whom they were addressed.

Marryat for the defendant contended, that no action could be maintained for the words, as the defendant was privileged to use them in a court of justice.

Garrow A. G. contra, denied that any such privilege existed before a Court of Conscience, which could not have inquired into the truth of the charge.

Lord ELLENBOROUGH.—If it had been proved that the defendant spoke these words in opening his defence to the commissioners of the Court of Conscience, I should immediately have directed a nonsuit. This would have been a privi-

leged communication, and the words could not be considered as spoken maliciously in the manner and form stated in the declaration. If the plaintiff had been robbing the defendant, the latter was justified in dismissing him immediately, and no claim to a week's further wages could exist. The Court of Conscience had to decide upon the propriety of the ground of dismissal. Therefore if the defendant used the words in a judicial mode, for the purpose of his defence, he is justified. On the contrary, if he spoke them *ad invidiam*, and in a calumniatory manner, they are actionable, though uttered in the room where the Court of Conscience was sitting. In the uncertainty in which we are, I must leave it as a question of fact for the jury.

Evidence was given in support of the special justification; and Lord *Ellenborough* left both questions to the jury, as to the manner in which the words were spoken, and as to the guilt or innocence of the plaintiff.

[213]

The defendant had the verdict.

Garrow A. G. and *Storks* for the plaintiff.

Marryat and *Walford* for the defendant.

[Attorneys, *Turvell* and *Mitchell*.]

See the authorities collected in *Rex v. Creevey*, 1 M. & S. 273.

1815.

TROTMAN
v.
DUNN.

1815.

Saturday,
June 17.

In an action for a malicious arrest, an allegation that the plaintiff gave bail to the sheriff for his appearance at the return of the writ, is not supported by evidence that he paid the debt and 10*l.* for costs into the hands of

[214]
the sheriff; but he may still maintain the action, although he cannot recover for the consequential damage.

BRISTOW v. HAYWOOD.

ACTION on the case for a malicious arrest.

The declaration, after alleging in the usual form that the plaintiff had been arrested maliciously, and without any reasonable cause, for the sum of 20*l.*, stated, that he was thereupon detained in custody until he gave bail to the sheriff for his appearance at the return of the writ.

In point of fact, the plaintiff on being arrested did not give bail, but paid the 20*l.*, together with 10*l.* for the costs, into the hands of the sheriff, under the late act of parliament.

The objection being taken, that the evidence contradicted the declaration,—

Lord ELLENBOROUGH said, certainly the plaintiff cannot recover any damages for being held to bail, or for being compelled to pay the debt and costs into the hands of the sheriff; but he may nevertheless support his action *pro tanto*; and if the arrest was malicious and without probable cause, I think he will be entitled to a verdict.

In an action for a malicious arrest, to shew the former suit determined, it is enough to put in a rule to discontinue on payment of costs, and to prove the costs taxed and paid.

To shew that the former suit was determined, the plaintiff put in a rule of court, by which the now defendant had leave to discontinue on payment of costs, and proved that the costs were accordingly taxed and paid.

The defendant's counsel contended that this evidence was insufficient, and relied upon *Kirk v. French*, 1 Esp. Cas. 80., in which it was held that in an action for a malicious arrest, to shew the former suit determined, it is not enough to put in a judge's order to stay proceedings on payment of costs, and to prove that the costs were paid accordingly.

Lord ELLENBOROUGH.—A judge's order to stay proceedings may not be enough to shew the cause determined; but where there is a rule of court to discontinue, on which the party obtaining it has acted by paying the costs, I think this is at least *prima facie* sufficient. I hardly know what other evidence is expected. Where there is merely a writ followed up with a discontinuance, I believe there never is any entry of judgment.

1815.

BRISTOW
v.
HAYWOOD.

[215]

The plaintiff, however, could not shew malice, and was nonsuited.

Garrow A. G. and *Comyn* for the plaintiff.

Park and *Lawes* for the defendant.

[Attorneys, *Mayhew* and *Collins*.]

Vide *Poynton v. Forster*, 3 Campb. 60.

MUNRO v. DE CHEMANT.

Monday,
June 19.

THIS was an action to recover the price of coals delivered to a lady, who was alleged to be the wife of the defendant.

It was proved that he had lived with her as his wife for 17 years, and during that time had always introduced her into society as such. He then turned her away, and it was while she was living separate from him, without any adequate means of support, that the coals in question were supplied to her.

He now insisted that she was not his wife.—On the other side it was contended that she was conclusively proved to be with her and represented her as his wife, if he can shew that in point of fact they were not married.

Although a man is conclusively liable for necessaries supplied to a woman while he is living with her as his wife; when they have

[216]
separated, he is not liable for necessaries supplied to her on the ground that he has lived

1815.

so; and that at all events he continued liable for necessaries supplied to her, having represented her to the world as his wife for a period of 17 years.

MUNRO
v.
DE CHE-
MANT.

Lord ELLENBOROUGH.—Had the goods been furnished while the defendant was living with this lady, his representation that she was his wife would have been conclusive against him: but I think his liability for necessaries supplied to her after they had separated depends entirely upon whether he really has been lawfully married to her or not. If the jury think upon the evidence that she is indeed his wife, they will find for the plaintiff; but the action cannot otherwise be maintained.

Verdict for the plaintiff.

Park and Tancred for the plaintiff.

Adolphus for the defendant.

[Attorneys, *James and Cunningham*.]

Vide *Robinson v. Nahon*, 1 Campb. 245.

[217]
Monday,
June 19.

STONE v. METCALFE.

A stipulation indorsed on a promissory note by the payee is not to be taken as part of that instrument, without evidence that it was written at the time when the note was made.

THE plaintiff declared in the usual form as payee against the defendant as maker of the following promissory note:

“ Wisbeck, 17th July, 1811.

“ Two years after the date hereof I promise to pay to *Edward Stone*, Esq. or his order, the sum of one thousand pounds, “ together with lawful interest for the same. Value received “ by me,
“ £ 1000.

Charles Metcalfe.”

Nothing more appeared on the face of the note; and the plaintiff launched his case by proving the hand-writing of the defendant as maker. The defence turned upon the effect of the following memorandum indorsed on the note:

1815.

 STONE
v.
METCALFE.

"Although the within promissory note is made payable to me by the within-named *Charles Metcalfe*, at the expiration of two years from the date thereof, still it is my will and desire that the money thereby secured shall not be called in at the expiration of that period, if the said *Charles Metcalfe* shall wish to continue the same on the within security for *any longer period*. And I do hereby desire that my executors or administrators, in case of my decease, do permit and suffer the same sum to remain on the within security, so long as it may be convenient to the said *Charles Metcalfe*, without suit at law or in equity against the said *Charles Metcalfe*, until three years after my death, provided he continues to pay the interest thereof regularly as the same becomes due. Witness my hand this 17th day of July, 1811.

[218]

"Edward Stone.

"Witness, *William Rediu.*"

It was contended on the authority of *Leeds v. Lancashire*, 2 Campb. 205., and *Hartley v. Wilkinson*, 4 Campb. 127., that this indorsement was to be incorporated with the note, and made the whole instrument a special agreement, which ought to have been stamped and declared upon as such.

But the indorsement was not distinctly proved to have been written before the note was signed.

Lord ELLENBOROUGH said, that if it was subsequently written when the note had been perfected and delivered in its absolute state, it could not be considered as a part of that instrument, although it chanced to be inscribed upon the same piece of paper. In that case, it was an agreement by way of defeasance, and it lay upon the defendant to produce it with a proper stamp. But even if the indorsement had been con-

1815. temporaneous with the body of the note, His Lordship said he should have thought it the expression of * an intended courtesy to the defendant, and not a qualification of the contract between the parties.

**STONE v.
METCALFE.**
[*219]

The plaintiff had a verdict.

Garrow A. G. and *Holroyd* for the plaintiff.

Topping and *Tindal* for the defendant.

[Attorneys, *Wortham* and *Baxters*.]

*Tuesday,
June 20.*

PICKERING v. RUDD.

Where the defendant nails to his own wall a board which overhangs the plaintiff's close, the remedy seems to be case and not trespass.

TRESPASS for breaking and entering the plaintiff's close, and placing a board over it, and cutting a tree, &c.

Plea, not guilty as to the *clausum fregit*; and as to cutting the tree, a justification that it was wrongfully growing against the wall of the defendant, and that he therefore removed it, as he lawfully might. New assignment of excess, and issue thereupon.

The defendant's house adjoins to the plaintiff's garden, the *locus in quo*; and to prove the breaking and entering of this, the evidence was, that the defendant had nailed upon his house a board, which projected several inches from the wall, and so far overhung the garden.

[220] *Garrow A. G.* and *Richardson* for the plaintiff contended, that this was a trespass for which he had a right to maintain the present action. *Cujus est solum, ejus est usque ad calum.* The space over the soil of the garden is the plaintiff's, like the minerals below, and an invasion of either is, in contemplation

of law, a breaking of his close. A mere temporary projection of a body through the air across the garden may not be actionable; but where a board is caused permanently to overhang the garden, this is a clear invasion of the plaintiff's possession. If this be not a trespass, it is easy to conceive that the whole garden may be overshadowed and excluded from the sun and air without a trespass being committed.

1815.

 PICKERING
v.
RUDD.

Lord ELLENBOROUGH—I do not think it is a trespass to interfere with the column of air superincumbent on the close. I once had occasion to rule upon the circuit, that a man who, from the outside of a field, discharged a gun into it, so as that the shot must have struck the soil, was guilty of breaking and entering it. A very learned judge, who went the circuit with me, at first doubted the decision, but I believe he afterwards approved of it, and that it met with the general concurrence of those to whom it was mentioned. But I am by no means prepared to say, that firing across a field *in vacuo*, no part of the contents touching it, amounts to a *clausum fregit*. Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass *quare clausum fregit*, at the suit of the occupier of every field over which his balloon passes in the course of his voyage. Whether the action may be maintained cannot depend upon the length of time for which the superincumbent air is invaded. If any damage arises from the object which overhangs the close, the remedy is by an action on the case.—Here the verdict depends upon the new assignment of excess in cutting down the tree.

[221]

The jury found for the defendant.

Garrow A. G. and Richardson for the plaintiff.

Jervis and Abbott for the defendant.

[Attorneys, *Caley and Prestland.*]

1815.

*Wednesday,
June 21.*

SAMPSON v. CHAMBERS and Another.

In an action against the hundred on the riot act, for damage done to a house; the breaking of inside window shutters,

[222]
ters, a window sill, and the wood of the fan-light, is sufficient evidence of a beginning to pull down, if the mob are interrupted and dispersed while committing these acts of violence, by an alarm of the approach of the military

THIS was an action on 1 G. 1. st. 2. c. 5. against two of the inhabitants of the hundred of Ossulston, for the damage done by a mob in feloniously beginning to demolish, and in part demolishing, the plaintiff's house in *Harley Street*.

It appeared that during the riots respecting the corn-bill, a mob assembled round the plaintiff's house, (mistakenly supposing that it belonged to a person who had supported that measure,) and threw stones and brickbats against it for a considerable time. In this manner several of the inside window shutters, a window sill, and part of the wood of the fan-light over the door, were broken, but none of the window frames. The mob in the mean time hollered out, "No corn bill!" While they were proceeding in this manner, a cry was raised that "the *Piccadilly* butchers were coming." The life-guards immediately rode up, and the mob dispersed.

Lord ELLENBOROUGH held, that there was here a sufficient beginning to demolish, within the meaning of the statute, and the plaintiff had a verdict.

Garrow A. G., Gaselee, and Peake, for the plaintiff.

Park for the defendant.

See the cases collected Wms. Saund. 377. b. (12.)

1815.

ADJOURNED Sittings at Guildhall

WALTON v. HASTINGS.

Monday,
June 26.

THIS was an action by the payee against the acceptor of a bill of exchange dated 10th *July* 1815, drawn by *E. Brooks*, payable three months after date.

The plaintiff sold goods to *Brooks*, which it was agreed should be paid for by a bill of exchange to be drawn by *Brooks* upon the defendant in favour of the plaintiff. *Brooks* accordingly on the 5th *July* drew the bill in question, which bore date on that day, and delivered it to the plaintiff. On the 10th of *July* this bill was carried by an agent of the plaintiff to the defendant for acceptance. The defendant said, "As the bill is now dated, I shall be from *London* when it becomes due, but if you will alter it to the 10th I will accept it." The plaintiff's agent altered it accordingly, and after it was so altered, the defendant accepted it. No communication upon the subject was made to *Brooks*, who in the mean time had left *London*.

If after a bill of exchange is delivered by the drawer to the payee, its date is altered by an agreement between the payee and the drawee before acceptance, it is void as against all the parties.

Jereis for the plaintiff contended, that the alteration being made before acceptance, the defendant was liable upon it as acceptor, although the drawer might be discharged. He relied upon *Paton v. Winter*, 1 *Taunt.* 420.

[224]

Lord ELLENBOROUGH.—Upon the stamp laws I think the bill is void. It was an existing valid instrument before the alteration. It was negotiated when delivered by *Brooks* to the plaintiff. The plaintiff as payee had acquired an absolute interest in it, and might have maintained an action upon it against the drawer. It did not remain *in fieri* till the acceptance. As to the drawer it was before then a perfect instrument. Nor was there any mistake to be rectified. When drawn on the 5th of

1815.

~~WALTON
v.
HASTINGS.~~

July it corresponded with the intentions both of drawer and payee. In the case cited, the objection on the stamp laws is stated not to have been taken, although that was the only objection which could be taken with any effect. The case therefore decides nothing, and was hardly worth reporting. Here, when the date was altered, a new bill was drawn, and that could not be done without a new stamp.

Plaintiff nonsuited.

Jervis and Espinasse for the plaintiff.*Topping* for the defendant.

[225]

Monday,
June 26.

MAVING v. TODD and Another.

A wharfinger by inserting in his receipts for goods, a notice that he will not be responsible for loss by fire, may entirely discharge himself from such responsibility.

THIS was an action against the defendants as wharfingers to recover the value of twenty-seven bundles of brushes.

The plaintiff, who resides at Newcastle, had ordered these brushes of Wilkinson, Rowlat, and Co. manufacturers in London. They delivered them at the defendants' wharf on the river Thames, directed to "Mr. Maving, Newcastle, to be sent by the next ship," and paid 3d. a bundle for wharfage, and 6d. for the sufferance of the whole. The goods were burnt by accidental fire upon the wharf, before there was an opportunity to ship them. The receipt which the defendants had given for them being produced, was found to contain the following words, "Not accountable for loss by fire."

Lord ELLENBOROUGH intimated an opinion that this discharged the defendants from whatever responsibility for fire they might otherwise have been subject to.

Garrow A. G. and *Holroyd* for the plaintiff contended, that it was not binding upon the plaintiff at Newcastle; and that

though the defendants might on reasonable terms limit their liability,* for loss by fire, they could not in this manner get rid of it altogether.

1815.

MAVING

v.

TODD.

[*226]

Lord ELLENBOROUGH.—I think notice to the agent here is notice to the principal at *Newcastle*. I am likewise of opinion that a wharfinger by such a notice may entirely get rid of his liability for loss by fire. It is evidence of a special contract for this purpose between him and every person who takes such a receipt for goods delivered at his wharf. Fire is such a terrible calamity, that it is reasonable the mere depository of goods should be enabled to guard against it, and to throw the risk entirely upon the owners.

Nonsuit.

Garrow A. G. and *Holroyd* for the plaintiff.

Park and Lawes for the defendants.

[*Attorneys, Atkinson and Hodgson*]

GLOSSOP v. JACOB.

[227]
Monday,
July 3.

THIS was an action against the acceptor of a foreign bill of exchange payable at 60 days after sight.

Across the bill were written the words

“ Accepted 26th October 1814,

B. Jacob.”

The defendant's name was proved to be of his handwriting, but the words above were in a different hand, and it did not appear by whom or when they were written. The witnesses

In an action against the acceptor of a bill of exchange payable after sight, if the defendant's signature as acceptor is proved, the date of the acceptance appearing over it, although in a different handwriting, will be presumed to have been written by his authority.

- 1815.** however stated, that when a bill payable after sight is to be accepted, it is usual for a clerk to write upon it the word "accepted," with the date, and then the drawee writes his own name under.
- GLOSSOP v. JACOB.**

The defendant's counsel objected that there was here no evidence when the bill was accepted, or when it became due. The plaintiff was bound either to prove by whom the date of the acceptance was written, or to shew that the bill was in an accepted state 63 days before the action was commenced. The defendant might have written his name upon it a month ago, and the plaintiff might since have superadded the fictitious date of 25th October 1814.

[228]

Lord ELLENBOROUGH.—I will leave it to the jury to presume that the date of the acceptance was written with the defendant's privity, at the time he accepted the bill. This appears to be according to mercantile practice; and it will be for the defendant to give some other date to the transaction.

Verdict for the plaintiff.

Park and Marryat for the plaintiff.

Garrow A. G. and Lawes for the defendant.

[Attorneys, *Watts and Collins.*]

*Friday,
July 7.*

In an action
on a valued
policy, it is
no defence
to prove
that the
assured
have re-

ceived the amount of the valuation in this policy from the underwriters on another policy, if the subject matter insured be proved to be of a value equal to the sum received and that sought to be recovered.

Bousfield v. Barnes.

THIS was an action on a policy of insurance on the ship *Ocean*, in the transport service from the 30th of August 1814 to the 29th August 1815, against all risks except those undertaken by government, valued at 6000*l.*

Only 600*l.* had been subscribed upon this policy.

1815.

By another policy with the *London Assurance* the ship was insured for 6000*l.* being valued at 8000*l.*

BOUSFIELD
v.
BARNES.

The ship was wrecked on the 22d of October 1814, among the *Magdalen Islands*, and the *London Assurance* thereupon paid to the plaintiff the 6000*l.* which they had subscribed. Evidence was now adduced that the ship was worth above 8000*l.*

The defendant's counsel contended that this action could not be maintained, as the plaintiff had already received the full amount of the sum at which the ship was valued by the policy on which the action was brought. The plaintiff was estopped to say to the underwriters on this policy that the ship was worth more than 6000*l.*, and therefore by receiving that sum he was fully indemnified. *Godsall v. Boldero*, 9 East, 72.

LORD ELLENBOROUGH.—I think the valuation in this policy is only conclusive in settling a loss upon it between the assured and the underwriters who have subscribed it, without taking into consideration what has been transacted between the assured and third persons. If a total loss happens, these underwriters shall not pay more than the amount of the valuation; and if there be a partial loss, the valuation regulates the amount of the average contribution. I will likewise take care that the assured do not recover upon the whole more than the real value of the subject-matter insured. But I think it is not enough for the underwriters on a particular policy to shew that the assured has received from another quarter the amount of the valuation in that policy, unless this amounts in point of fact to a complete indemnity. In the present case the ship insured is proved to have been worth above 8000*l.* The plaintiff has received only 6000*l.* from the *London Assurance*. He has therefore an interest of 2000*l.* to which he may apply the policy on which the action is brought. That policy is only subscribed for 600*l.* Therefore, when the whole of that

[230]

1815. sum has been paid, he will still be a loser to the amount of 1400*l.* by the total loss of his vessel.

Bousfield
v.
Barnes.

Verdict for the plaintiff.

Park and Taddy for the plaintiff.

Topping and Marryat for the defendant.

[*Attorneys, Tomlinson and Farlow.*]

[231]
Saturday,
July 8.

THORNTON and Others v. LANCE and Others.

In an action on a policy of insurance, it will be presumed that the ship complied with the provisions of the convoy act, till the contrary is proved.

THIS was an action on the guarantee of a policy of insurance at and from *London* to *Archangel*.

Several points arose; but only one of them was finally disposed of at *Nisi Prius*, viz. whether the onus lay upon the assured to shew that the ship sailed with convoy.

The defendants' counsel contended, that as the statute 34 G. 3. c. 57. expressly requires *British* ships to sail with convoy, and declares policies of insurance upon them to be void if they do not, it was incumbent upon the assured to shew that this condition had been complied with.

Lord ELLENBOROUGH.—As the law requires that the ship should sail with convoy, I will presume that the law was obeyed till the contrary is shewn. This principle has been settled in *Williams v. East India Company* (*a*), and a variety of other cases.

The decision upon this point was acquiesced in, but a case
was reserved for the opinion of the court, upon the effect of
the master of the ship being a foreigner.

1815.

THORNTON
v.
LANCE.

Marryat and *F. Pollock* for the plaintiffs.

Scarlett and *Littledale* for the defendants.

[Attorneys, *Sherwood* and *Cooper*.]

1815.

COURT OF COMMON PLEAS.

ADJOURNED Sittings at GUILDHALL.

*Friday,
June 23.*

BACK and Another, Assignees of BURROWS and WINN,
Bankrupts, v. GOOCH.

An assignment by deed of all the effects of a trader to trustees, for the benefit of his creditors, with a proviso, that it should be void if all the creditors did not execute it, and that in the meantime the acts of the trustees should be good, is an act of bankruptcy, although not executed by the trustees or creditors.

But a creditor who, without executing, has assented to
[233]
the deed, by approving of acts done under it by the trustees, is estopped from setting it up as an act of bankruptcy, and it will not support a commission sued out by him as petitioning creditor.

THIS case turned upon the sufficiency of the act of bankruptcy to support the commission, which was sued out on the petition of one *Bloom*, and was dated 26th December 1813.

The plaintiffs relied upon a deed dated 13th December, and executed by both the bankrupts; whereby they conveyed the whole of their effects to trustees, for the benefit of all their creditors, with a proviso that it should be void if all the creditors did not execute it, and that in the mean time the acts of the trustees should be good.

The deed was not executed by the trustees or any of the creditors; but the trustees, with the knowledge and approbation of *Bloom*, acted under it for a fortnight, and during that time took possession of 1200 sacks of meal belonging to the bankrupts.

Shepherd S. G. for the defendant, first objected that the execution of this deed was no act of bankruptcy, on account of the proviso that it should be void unless executed by all the creditors. But

GIBBS C. J. was of opinion that this proviso was immaterial, as the deed gave power to the trustees to act in the setting it up as an act of bankruptcy, and it will not support a commission sued out by him as petitioning creditor.

mean time, and thus divested the bankrupts of all controul over their affairs. (a)

1815.

BACK
"Gooch.

Shepherd S. G. next contended, that the execution of the deed could not be set up as an act of bankruptcy to support this commission, as *Bloom*, the petitioning creditor, had assented to it; and he relied upon *Bamford v. Baron*, 2 T. R. 594. n.

Lens Serjt. and *Spankie* for the plaintiffs. In *Bamford v. Baron*, the petitioning creditors had actually executed the deed, and were the trustees under it, to whom the property of the bankrupt was conveyed. It was therefore properly held, that they should not afterwards represent the deed to be fraudulent, and set it up as an act of bankruptcy. But the doctrine of that case has never been extended to persons who had not executed the deed. It may be admitted, that in point of fact *Bloom* assented to the deed; but executing the deed is the only assent which can operate as an estoppel in point of law. There can be no doubt that this deed was void, and that by executing it *Burrows* and *Winn* committed an act of bankruptcy. Why then should the commission be overset, because the petitioning creditor, who was no party to it, for a moment was willing to see whether the property could be fairly administered under it, and seeing that impossible, proceeded to strike the docket?

[234]

Ginns C. J.—I am of opinion, that upon the principle laid down in *Bamford v. Baron*, *Bloom* cannot avail himself of the execution of this deed as an act of bankruptcy. The deed contains a conveyance of all the effects of these traders to trustees, to be distributed in the manner therein specified. The law says the deed is void, as it takes the management of their affairs completely from the bankrupts, and lodges it in the hands of trustees. But although the deed be void by the operation of the bankrupt laws, it is not necessarily an act of bankruptcy. If a trader, without deed, transfers all his effects for the benefit of his creditors, this is void, but is

(a) Vide *Dutton v. Morrison*, 17 Ves. 193. *Tapenden v. Burgess*, 4 East, 230.

- 1815.** not an act of bankruptcy ; because it does not fall within any of the statutes by which acts of bankruptcy are defined. To constitute this act of bankruptcy, the trader must make, or cause to be made, a fraudulent grant or conveyance of his lands, tenements, goods or chattels, with intent to defeat or delay his creditors (*a*). But the law says the deed cannot be considered fraudulent as to those who are privy and assent to it. A creditor who feels himself aggrieved, and thinks that he shall be defeated or delayed, may sue out a commission, and rely upon the deed as the act of bankruptcy. But in *Bamford v. Baron*, the principle was laid down, that those who have assented to the deed cannot afterwards set it up as fraudulent. If the deed be not fraudulent, the execution of it is no act of bankruptcy. Here, although *Bloom* did not formally sign and seal the deed, he was privy to its contents, and he approved of the trustees taking possession of the property under it, for the purpose of being distributed among himself and the other creditors. Indeed, it is admitted, that in point of fact, he did assent to the deed. Having done so, I am of opinion, that he cannot now turn round, and say, that it was fraudulent. There appears, therefore, to be no act of bankruptcy to sustain this commission which he has sued out.

Plaintiffs nonsuited.

Lens Serjt. and Spankie for the plaintiffs.

Shepherd S. G., Onslow Serjt. and F. Pollock, for the defendant.

[Attorneys *Windus* and *Abbott*.]

(*a*) 1 Jac. 1. c. 15. s. 2.

I have been furnished with a similar decision of Mr. Justice CHAMBRE, by one of the learned counsel in the cause.

HICKS and Another, Assignees of PENFORD v. BURFITT.

Winchester Spring Assizes, 1812.

- To prove an act of bankruptcy, *Burrough* put in a deed, by which [236] the bankrupt assigned *all* his effects to trustees, for the benefit of his

1815.

WITHERS and Another v. LYSS and Others.

Saturday,
June 24.

TROVER for a quantity of rosin.

The defendants, *Lyss and Co.*, in September 1812, sold, and were paid for the rosin in question, which was then in their warehouse, to *Withers and Co.*, the plaintiffs. Not having immediate occasion for the rosin, the plaintiffs requested that it might be kept in their names and at their disposal, by the be paid by a bill of exchange. The vendor gives the purchaser an order to the warehouseman to weigh and deliver the goods, which is lodged with the warehouseman. but before the goods are weighed the purchaser becomes insolvent. The vendor has a right to stop them in transitu.

A particular parcel of goods in the possession of a warehouseman, is sold at so much per cwt, the weight of the whole being uncertain, to

creditors. It appeared, however, upon the cross-examination of the subscribing witness, that the deed was executed on the 7th November 1813, in consequence of a meeting of the bankrupt and several of his creditors, (amongst whom was one of the petitioning creditors,) called for the purpose of examining the bankrupt's affairs, at which meeting it was agreed, although the petitioning creditor expressed an opinion to the contrary, that the bankrupt should make such an assignment :— that the deed was therupon executed by the bankrupt, but was never executed by the trustees, or any of the creditors : and the same day, after the execution of the deed, the petitioning creditor made affidavit of his debt, and struck the docket.

Jekyll and Gifford for the defendant therupon objected, that as the petitioning creditor was privy to and consenting to this deed, he could not set it up as an act of bankruptcy to support the commission.

To this it was replied by *Burrough and Gaselee*, that the cases had only gone that length where the petitioning creditor had actually *executed* the deed, which here he had not done.

But CHAMBRE J. ruled, that as he had been consenting to the execution, he could not now take advantage of it as an act of bankruptcy. He therefore nonsuited the plaintiffs, giving them, however, liberty to move to set it aside ; but no motion was made.

1815. defendants, which was accordingly done. On the 21st *September* the same rosin was sold by the plaintiffs to *D. Bromer*, through the intervention of a broker. The following is a copy of the sale note :

"Messrs. Withers and Co."

" I have this day sold by your order, and for your account,
" to Mr. *D. Bromer*, 30 tons (more or less) of town made
" transparent rosin, in matts, at 13s. 9d. per cwt. with custo-
" mary allowances, payable at the end of 14 days, by accept-
" ance, at 6 months' date."

On the same day, the plaintiffs wrote, and delivered to *Bromer* a delivery order for the rosin, in the following words :

"Messrs. Lyss and Co."

[238] " Please to weigh and deliver to Mr. *D. Bromer*, or order,
" our transparent rosin, in matts (about 30 tons more or
" less).

"Withers and Co."

This order was lodged with the defendants by *Bromer*, and on the 6th *October* they were ready to weigh and deliver the rosin to him, but he never sent any person to see it weighed. In consequence it never was weighed, and it has ever since remained in the defendants' warehouse.

On the 17th of *October* *Bromer* stopped payment, and on the 19th of the same month the defendants received a written countermand of the order to deliver the rosin to him, with notice to hold it on the plaintiff's account. A commission of bankruptcy issued against *Bromer* on the 2d of *November*.

There was afterwards a demand and refusal to deliver up the rosin to the plaintiffs.

Vaughan Serjt. for the plaintiffs contended, that till the rosin was weighed the delivery to *Bromer* was not complete, and the right to stop *in transitu* subsisted upon his insolvency.

Shepherd S. G. contra, distinguished the present from the cases lately decided upon this subject, by this circumstance, that here the whole of the rosin was sold to *Bromer*. It was a sale to him of a specific parcel of rosin, and no question about the identity of the subject matter sold could arise. Therefore, upon the lodging of the delivery order with the defendants, they became his agents, and held the article on his account. Suppose the rosin had been sent home to *Bromer's* own warehouse, without being weighed, there can be no doubt that the delivery would have been complete. But what difference can it make that it remained at the warehouse of his agents, for which he was paying rent. That part of the defendants' warehouse, in which the rosin lay, was his as much as if the whole had been demised to him.—On the statute of *James*, likewise, he argued that the goods would pass to the assignees of *Bromer*.

1815.

WITHERS
v.
Lyss.

[239]

Gibbs C. J.—Here something was still to be done to ascertain the price of the commodity. The rosin was sold at 13s. 9d. per cwt. and the quantity was uncertain. Therefore, till it was weighed, the bill of exchange by which payment was to be made could not be drawn. That being so, according to the decisions, both of this Court and the Court of King's Bench, the delivery was not complete, and the right to stop *in transitu* subsisted. I think it makes no difference that the whole of the rosin was sold. The principle, I take to be, that while any thing remains to be done to ascertain the price, the possession is not considered as transferred to the purchaser. Had the rosin been burnt in the defendants' warehouse without being weighed, how could payment have been made according to the terms of the contract? If nothing remains to be done to ascertain the price, I allow that a delivery order lodged with the warehouseman is a sufficient transfer of the possession, although no entry for that purpose be made in his books. The order here is, “weigh and deliver.” There could be no delivery under it without weighing, and the goods never were delivered to *Bromer*.—The statute of *James* depends on the previous question, for if they were never delivered to him they could not be in his order and disposition.

[240]

1815. *Vaughan, Blosset, Serjts., and Marryat*, for the plaintiffs.

WITHERS
v.
Lyss.

Shepherd S^t. G. and Taddy for the defendants.

[Attornies, *Church and Tomlinsons.*]

See the cases collected in *Bush v. Davies*, 2 M. & S. 397.

[241]
Saturday,
June 24.

GILLAN, Widow, v. SIMPKIN.

There is an agreement to carry a passenger on board a ship from London to the West Indies, the passage money to be paid in London before the commencement of the voyage.

The passenger puts his baggage on board in the Thames, meaning himself to embark at Portsmouth. The ship is lost in going round to that place.

—The passage money cannot be recovered back.

Alier if the agree-

[242]
ment had been to carry the passenger from Portsmouth to the West Indies.

MONEY had and received, to recover the sum of 42*l.*

The defendant was master of the ship *Friendship*, in which he had agreed to carry the plaintiff as a passenger to *Antigua* in the *West Indies*, for 40 guineas. This sum she paid him in *London*, before the commencement of the voyage. There was some doubt upon the evidence, whether, according to the agreement, she was to be carried from *London* or from *Portsmouth*. She intended to have gone on board at the latter place; but in point of fact her baggage was shipt in the river *Thames*. In proceeding round from thence to *Portsmouth* the ship was lost. The witnesses stated, that it is usual for the passage-money to be paid in *London*, and that the stores for the use of the passengers, during the voyage, are always put on board in the river.

GIBBS C. J. desired the jury to consider, whether, with respect to the plaintiff, the voyage was to commence from *London*. Even in that case, if the money had been to be paid at the end of the voyage, the defendant could not have recovered any part of it, there being an entire contract to carry the plaintiff from *London* to *Antigua*. But if the voyage was commenced, and the ship was prevented from completing it by perils of navigation, His Lordship said, the captain may be entitled to

retain the passage-money previously paid to him. The contract for this purpose may either be express or may be evidenced by established usage. Here it is proved, that in *West India* voyages the passage money is paid before the voyage commences, and it does not appear to be returned, although the voyage is defeated. On the other hand, if the ship was lost before the commencement of the voyage for which these parties had contracted, the money paid by anticipation must be returned.

1815.

 GILLAN
 v.
 SIMPKIN.

Verdict for the defendant.

Vaughan Serjt. and *Lawes* for the plaintiff.

Best Serjt. for the defendant.

Vide *Andrew v. Moorhouse*, 5 Taunt. 435.

PEEL v. PRICE.

[243].
Tuesday,
June 27.

THIS was a special action on the case for deceitfully representing that the defendant's ship would sail from the port of *London* to *Messina* and *Naples*, and then altering her destination to *Naples* and *Messina*, whereby the plaintiff, who had shipped goods on board her for *Messina*, and effected policies of insurance to cover that risk, was afterwards forced to effect other policies at a higher premium, giving the ship leave to sail to *Naples* before going to *Messina*.

In *February* 1813, the defendant printed and circulated a card, stating that this ship was to proceed to " *Messina* and *Naples*. " One of these cards had been received by the plaintiff, but at what time did not appear. No freight offering, the defendant, about the month of *April*, altered the destination of the ship in this amongst other respects, that she was to sail

A general ship having been advertised for a particular voyage, if her destination is in any respect altered, the owner is bound to give specific notice of the alteration to every person who ships goods on board.

1815.

**PEEL
v.
PRICE.**

[244]

to "Naples and Messina." A fresh card was printed and placed in the defendant's counting-house. The plaintiff afterwards came there to enquire about the ship; but there was no evidence that he saw the first card, or that then, or when the goods were received on board, or at any other time, a copy of it was delivered to him or any of his agents. The ship sailed to Naples in the first instance, and the plaintiff effected policies in the manner stated in the declaration. It was proved to be common to alter the destination of ships when freight cannot be procured for them.

Shepherd S. G., for the defendant, contended that the plaintiff was bound to have made specific inquiries as to the destination of the ship, before he put his goods on board; in which case he would have learned that it had been altered. His loss arose from his own negligence. He might have supposed that the card issued in February was obsolete in June. The defendant could do no more than print and circulate a fresh card in the usual manner.

Gibbs C. J. He might have delivered a copy of that card to the plaintiff; and I think he was bound to do so. When a card has been published, advertising a ship for a specific voyage, if that be altered, I am of opinion that the owner is bound to give specific notice of the alteration, to all persons who afterwards ship goods on board the vessel; and that he is otherwise answerable for the loss which they sustain by supposing that the destination of the vessel remains unaltered.

The plaintiff had a verdict for the difference of premium in effecting the two sets of policies.

* *Best Serjt.* and *Richardson* for the plaintiff.

Shepherd S. G., *Pell Serjt.*, and *Campbell*, for the defendant.

[*Attorneys, Willies and Nind.*]

1815.

Rose and Another, Assignees of CLAUSEY a Bankrupt, v. *Thursday, June 29,*
Rowcroft.

THE question in this case was upon the sufficiency of the petitioning creditor's debt to support the commission, which was dated 5th December 1814.

The plaintiff's relied upon a bill of exchange dated 23d October, 1814, drawn by the bankrupt, payable to his own order, at three months after date, upon and accepted by *J. Sherwood*, indorsed by the bankrupt to *J. Wallron*, and by him to the petitioning creditor.

The defendant's counsel made two objections, 1st, That this bill could not constitute a good petitioning creditor's debt against the drawer, till it was dishonoured by the acceptor; and, 2dly, That there was no evidence that it had been indorsed to the petitioning creditor before the commission was sued out.

On the other side they contended that a bill of exchange, payable at a future day, is a good petitioning creditor's debt against the drawer, by virtue of 5 Geo. 2. c. 30. s. 22.; and that it must be presumed that this bill of exchange was indorsed to the petitioning creditor before he sued out the commission.

GIBBS C. J.—I think the petitioning creditor's debt is not sufficiently established, as you have not shewn when the bill was indorsed to him. I give no opinion on the point, whether it would have constituted a good petitioning creditor's debt, had it been proved to have been in his hands before the suing out of the commission.

[246.]

Nonsuit.

1815.

Best, Vaughan, Serjts. and Wyld, for the plaintiffs.

**Rose
v.
Row-
croft.**

Shepherd S. G. and Taddy for the defendant.[Attorneys, *Dennets and Reardon.*]

But a negotiable security, drawn before and indorsed to the petitioning creditor after the act of bankruptcy, and before the suing out of the commission, is a good petitioning creditor's debt. *Bingley v. Maddison*, Co. B. L. 20.

Wednesday, July 5. O'REILLY and Others v. ROYAL EXCHANGE ASSURANCE.

Where a policy of insurance [247] contains a warranty against seizure in port, if the ship, to avoid such seizure, runs to sea before she is properly loaded, and is, in consequence, obliged to go to a port out of the course of the voyage insured, the underwriters are not liable for a subsequent loss.

THIS was an action on a policy of insurance on goods in the *Catherina* at and from *La Guayra* to the ship's port of discharge without the *Baltic* and north of *Gottenburgh*, with liberty to touch at a port in *England* for orders, and also with liberty to join convoy at the place of rendezvous in the *West Indies*, warranted to depart finally for *Europe* on or before the 1st of *August*, and also warranted free of capture and seizure and the consequences thereof in port in *La Guayra*, at 12 guineas per cent., to return 2 per cent. if the ship should not touch at *Jamaica* or the *Havannah*, and arrive;—with other returns not necessary to be specified.

The *Catherina* arrived at *La Guayra* on the 26th of *March*, and on the 16th of *May* began to take in her cargo. She was about half loaded when the *Spanish* patriots, then in possession of the province of *Caraccas*, were defeated in battle by the royalists, who advanced upon *La Guayra*. The *Catherina* was forced by the magistrates to take on board as passengers a great number of persons who were afraid of being

1815.

O'REILLY
v.
ROYAL EX-
CHANGE
ASSURANCE

massacred, and on the 7th of July she cut her cable and proceeded to sea, under the protection of an English ship of war bound to St. Thomas's. From being too light, she fell greatly to leeward, and made the small island of *Casa del Muerte*, to the southward of *Porto Rico*. She was incapable of beating up from thence to St. Thomas's. A few days before, she had lost the hook of her rudder. Partly for the purpose of getting the helm repaired, and partly for the purpose of completing the homeward cargo, she proceeded to *Jacmel* on the south side of St. Domingo. This was very considerably out of the direct course of the voyage to *England*, which would have been through the *Mona* passage. It was, however, the most convenient port for getting the helm repaired and for completing the homeward cargo. From having the patriots on board, she could not touch at any of the Spanish islands, which were all in the possession of the royalists. She arrived at *Jacmel* on the 18th of July, and was wrecked there on the 24th of the same month. If the ship had not been so light, she could have made St. Thomas's without difficulty in the first instance. The intention was to have completed the homeward cargo there. *Jacmel* was then substituted, upon a consultation between the super-cargo and the master of the ship. A part of the outward cargo was still on board, and that required to be unloaded and disposed of before a homeward cargo could be procured.

[248]

GIBBS C. J. was clearly of opinion that under these circumstances the plaintiffs were not entitled to recover. He attached particular weight to the warranty in the policy against capture and seizure in port. To avoid a loss of that sort, for which the defendants would not have been liable, the ship cut her cable and proceeded to sea in a state in which she was not properly fit to perform the voyage home. After that, she goes to a port out of the course of the voyage, to unload her outward and to complete her homeward cargo, without any liberty for that purpose. She might do so, to be sure; but not at the risk of the underwriters.

Plaintiffs nonsuited.

1815. *Lens, Blosset, Serjts. and Littledale*, for the plaintiffs.

O'REILLY
v.
ROYAL EX-
CHANGE
ASSURANCE

Shepherd S. G., Best, and Bosanquet, Serjts. for the defendants.

[Attorneys, *Dennetts and Kaye*.]

See next case.

Wednesday,
July 5.

O'REILLY and Others v. GONNE.

Where a policy of insurance contains no warranty against seizure in port, if the ship to avoid such seizure runs to sea before she is properly loaded, and is in consequence obliged to go to a port out of the direct course of the voyage insured, the

[250]
underwriters are liable for a subsequent loss.

THIS was an action on a policy of insurance on the freight of the same ship, in the same voyage mentioned in the preceding case. The risk here was described to be "at and from *La Guayra* and any port or ports, place or places, on the *Spanish Main*, all or any, to any port or ports in the *North Sea*, not in the *Baltic*, nor northward of *Gottenburgh*, all or any, with liberty to call at all or any of the *West India* islands, colonies, and settlements, at *Gibraltar*, any port or ports in *Spain* without the *Straights*, and at any port or ports in *England*, to wait for orders, or for any purposes whatsoever, all or any, warranted to sail on or before the 1st of *August, 1814*." And to the usual words, giving leave to touch and stay at any ports or places whatsoever, were subjoined the following words in writing: "And wheresoever to seek, join, and exchange convoys, load, unload, and reload goods and specie, wait for orders, or for any purposes whatever, all or any, without being deemed any deviation."

The evidence here was the same as in the former case. The plaintiffs' counsel contended that the policy was essentially different, and relied upon *Metcalf v. Parry*, 4 Campb. 123.; while it was insisted for the defendant that the liberties contained in this policy must be confined to ports in the direct course of the voyage from *La Guayra* to *Europe*.

GIBBS C. J.—This case is widely different from the last. There the ship was warranted free of seizure in port; but this policy is without any such exception. She was, therefore, unquestionably under its protection when she sailed light from *La Guayra*; and the present underwriters, who would have been liable had she been seized in port, can make no objection that she was unable to bear up to *St. Thomas's*. She was forced to sail light, and was unable to pursue the direct voyage home. Finding it impossible to make *St. Thomas's*, it will be for the jury to consider whether *Jacmel* was not, under all the circumstances, as convenient a port as she could have selected.

1815.

ORRULLY
v.
GONNE.

Verdict for the plaintiffs.

Lens, Blosset, Serjts., and Littledale, for the plaintiffs.

[251]

Best, Vaughan, Serjts., and Campbell, for the defendant.{*Attorneys—Dunnells and Rardon*}

- The Court of Common Pleas granted a new trial to have the fact further investigated, whether the ship, not being able to make *St. Thomas's*, nor to touch at any of the *Spanish* islands, was out of the proper course of her voyage home, on going to *Jacmel*; but the second jury came to the same conclusion.

SPEAR v. TRAVERS and Another.

Thursday,
July 6.

TROVER for 20 hogsheads of sugar. The defendants, on the 2d of Nov. 1814, purchased the sugars in question from *Davidson, Graham, and Co.*, by whom they had been imported, and received from them the dock delivery order, which was immediately lodged with the *West India Dock*

the usual cheque for them, which, having sold the goods to B., he indorses and delivers to him. B. sells the goods, and delivers the cheque to C. on credit. On C.'s insolvency, A. cannot lawfully take possession of the goods, although they have continued to stand in his name, and the cheque has not been lodged with the Dock Company.

Goods
being en-
tered in
the books
of the W. I.
Dock Com-
pany in the
name of A.,
be receives

1815.

SPEAR
v.
TRAVERS.

[*252]

Company.—The sugars were then entered in the company's books in the names of the defendants, who received for them the usual cheque or certificate. On the 4th of November the sugars were * sold by the defendants to *J. Meaby*, and on the 25th of November by *Meaby* to *Greaves*, when the cheque or certificate indorsed by the defendants was delivered to him. In payment of the sugars to *Meaby*, *Greaves* accepted a bill for 950*l.* payable at 70 days. On the 6th of January, *Greaves* transferred the cheque or certificate to the plaintiff, as a security for 2000*l.* which the plaintiff then advanced to him, and which still remains due. On the 16th of January, *Greaves* stopped payment, and next day the defendants gave notice to the Dock Company not to deliver the sugars except to them. *Greaves*'s acceptance became due, and was dishonoured, the 4th of February. On the 17th of the same month the defendants applied by letter to the Dock Company for a duplicate cheque or certificate, representing that the original was lost. A duplicate was accordingly granted, under which, on the 18th, the sugars were delivered to the defendants. The sugars had all along remained in the names of the defendants, who paid rent for them to the company down to that time. Had the plaintiff presented the cheque or certificate to the company any time before the 17th of January, he might have had the possession of the sugars; but he did not do so till the stop had been put upon them after *Greaves*'s insolvency.

[253]

Shepherd S. G. for the defendants contended, that the goods had been properly stopped *in transitu*. Till the certificate was lodged with the Dock Company, they were not in the possession of the purchaser, and any previous seller had a right to stop them. The only way in which it could be argued that the possession was changed, was by asserting that the Dock Company had become the agents of the plaintiff, and held the goods on his account. But how could that be, when there never had been any privity whatever between these parties. The payment of rent by the defendants was decisive to shew that the Dock Company had continued their agents all along. The Dock Company were merely in the situation of common warehousemen, and must necessarily be consider-

ed the agents of that party who delivered the goods to them, in whose name the goods stood in their books, and by whom they were recompensed.

1815.

~~SPEAR~~~~TRAVERS.~~

GIBBS C. J.—I think the defendants had no right to stop these goods. They had been paid for them. This is an improper attempt on their part to assist *Meaby*. They have not got possession of the goods in the exercise of any right to stop *in transitu*, but by a falsehood. I am of opinion that the plaintiff, to whom the certificate was transferred for a valuable consideration, is entitled to recover.

Verdict accordingly.

The gentlemen of the special jury observed, that in practice the indorsed dock warrants and certificates are handed from seller to buyer, as a complete transfer of the goods.

[254]

Lens and *Best* Serjts. and *Campbell* for the plaintiff.

Shepherd S. G. and *Richardson* for the defendants.

[Attornies, *Holt* and *Amory*.]

Vide *Withers v. Lyss*, ante, 237.

HARDER v. BROTHERSTONE and Another.

Thursday,
July 6.

THE first count of the declaration stated, that the plaintiff carried on business as a merchant at *Pernau*, in the empire of *Russia*; that a ship of the defendants' called the *Mar-* owner of a ship, that a bill of exchange drawn by the master on a third person for money advanced for the ship's use abroad, shall be duly honoured.

A chartered ship, at her outward port, being in want of money for her necessary disbursements, a merchant there being shewn the charter-party, by which the freighter covenants to furnish what money might be required for the necessary disbursements of the ship, advances the requisite sum to the master, and takes a bill of exchange drawn by him for the amount upon the freighter: held, that on this bill being dishonoured by the freighter, the owner of the ship was not liable for any part of the money advanced.

There is no implied undertaking on the part of the

1815. *garet*, being at that place, a sum of money was necessarily wanted for her use; that thereupon, in consideration that the plaintiff would advance this money, the defendants undertook that a bill of exchange, to be drawn as a security for the amount, by *Benjamin Johns*, the master of the ship, on *William Sharples*, at *Liverpool*, should be duly honoured; that the plaintiff did accordingly advance the money, but *Sharples* refused to accept or pay the bill; by means whereof it was returned to the plaintiff at *Pernau*, and he was compelled to pay a large sum of money for *recambio*, and other charges upon it. The declaration likewise contained the usual money counts.

HARDER
v.
BROTHER-
STONE.
[255]

GIBBS C. J. stated, that he was clearly of opinion there was no implied undertaking on the part of the owner of a ship, that a bill of exchange drawn by the master on a third person, for money advanced for the ship's use abroad, shall be duly honoured.—Upon this intimation the special court was abandoned.

The *Margaret* was chartered by the defendants, her owners to *William Sharples* of *Liverpool*, for a voyage from *Newcastle* to *Copenhagen* and *Pernau*, and from thence to *Liverpool*, to bring home a cargo of deals and iron on his account, at certain specified rates of freight, which was partly to be paid “by advancing the master of the vessel for the time being “what money he might require for the vessel's necessary dis-“bursements at *Pernau*, free from any commission, at the “current exchange.”

Upon the arrival of the ship at *Pernau*, *Johns*, the master, [256] was sent for by the plaintiff, who is a merchant there. *Johns* shewed him a copy of the charter-party. A considerable sum of money was necessary for the ship's disbursements. This the plaintiff advanced to *Johns*, and he furnished certain stores of which she stood in need, amounting altogether to the sum of 364*l.* 19*s.* 11*d.* For this *Johns* drew a bill of exchange in favour of the plaintiff upon *Sharples*. The ship was lost upon the homeward voyage, and *Sharples* refused to accept the bill.

GIBBS C. J.—I am of opinion that the defendants are not liable in this action. No privity is established between them and the plaintiff. He appears to have advanced the money on the credit of *Sharples*. He first sent for the captain, and he was shewn the charter-party before any part of the money was advanced. I cannot consider the captain as the agent of the defendants when the money was advanced to him, and I can discover no implied promise on their part to repay it.

1815.

 HARDER
 v.
 BROTHER-
 STONE.

Plaintiff nonsuited.

Shepherd S. G. and Campbell for the plaintiff.

Vaughan Serjt. and Littledale for the defendants.

[Attorneys, *Holt and Dawes*.]

Vide *Cary v. White*, 1 Bro. Par. Cas. 284. *Evans v. Williams*, Abb. Shipp. 128.

MARSH v. PEDDER and Others.

 [257]
 Friday,
 July 7.

THIS was an action of covenant on a charter-party, by which the plaintiff, master of the ship *Rover*, let her to freight to the defendants, for a voyage from *London* to *Antwerp*, and the defendants covenanted, that “the said master or his assigns should be paid by the affreighters or their assigns, “on a right and true delivery of her cargo according to the “bills of lading signed by the master, in full for freight and “primeage 400*l.* sterling, with 10*l.* hat-money : the vessel to “be addressed to the said affreighters’ correspondent at *Antwerp*.” The declaration alleged that the voyage was performed, and assigned a breach in the non-payment of the 410*l.*

Where there is a charter-party covenanting for payment of freight on a right and true delivery of the goods at a foreign port, the freighter is not discharged by the master there taking from the freighter’s agent, who was furnished with funds to pay him the freight, a bill of exchange upon a third person, by whom it is accepted, if the bill is not duly honoured, although the agent fail with the amount of the freight in his hands ; unless the master had the offer of cash payment, and preferred the bill for his own convenience.

1815.
MARCH
v.
PADDON.

The defendants pleaded 1st, payment generally; and 2dly, that after the delivery of the cargo at *Antwerp*, one *Joseph Osy*, to whom plaintiff was directed to apply at *Antwerp* touching the said cargo, and the said freight, primage, and hat-money, paid plaintiff the sum of 151*l.* 13*s.* 6*d.* of the said sums of 400*l.* and 10*l.* and for the residuc thereof gave to plaintiff his certain bill of exchange, drawn by the said *Joseph Osy* upon certain persons in *London* using the style and firm of Messrs. *Baker, Munt, and Page*, and bearing date on the 18th day of *April* 1815, payable at 60 days' date, to the order of plaintiff, for the sum of 258*l.* 6*s.* 6*d.* residue of the said sums of 400*l.* and 10*l.*, which said bill of exchange, the persons to whom the same was directed as aforesaid, afterwards, &c. duly accepted, and which said sum of 151*l.* 13*s.* 6*d.* and which said bill of exchange plaintiff freely accepted, took and received in full payment and satisfaction of the sums of 400*l.* and 10*l.* in the declaration mentioned.

[258]

Replication to last plea, that the said *Joseph Osy*, as agent and assign of defendants, gave, and plaintiff received from the said *Joseph Osy*, as such agent and assign, the said bill of exchange, only as a security for the sum of 258*l.* 6*s.* 6*d.* parcel &c. and that the said bill of exchange afterwards, and before the commencement of this suit, to wit, &c. on account of the insolvency of the said *Joseph Osy* and the said Messrs. *Baker, Munt, and Page*, became and was of no use or value to plaintiff; without this, that plaintiff took and received the said sum of 151*l.* 13*s.* 6*d.* and the said bill of exchange, in full payment and satisfaction of the said sums of 400*l.* and 10*l.* &c.

[259]

The case was tried upon admissions, which stated, that the defendants duly freighted the plaintiff's ship *Rover*, and that the said ship proceeded to *Antwerp*, and duly delivered her cargo to the consignees thereof; whereupon the plaintiff became entitled to 400*l.* freight and primage, and 10*l.* hat-money:—that the defendants having directed the plaintiff to address himself to *Joseph Osy*, who then resided at *Antwerp*, for his freight, primage, and hat-money, wrote, on the 17th day of *March* last, a letter to the said *Joseph Osy*, to the

effect following, which letter was duly delivered by the plaintiff to the said *Joseph Osy*:

1815.'

"*Mr. Joseph Osy, Antwerp.*

MARSH
v.
PEDDER.

"SIR,

"The present will be handed you by *Captain Stephen Marsh*, of the *Rover*, and who will address himself to your good care. You will please to pay him the amount of his charter-party, of which we enclose you a copy, say for freight 400*l.*, hat-money 10*l.* 410*l.* in all. According to the manifest you will please receive for our account 457*l.* 9*s.* 1*d.* The balance we shall be obliged by your remitting us, less your charges thereon. Pray give us the earliest intelligence of this vessel's arrival.

(Signed) "Pedder, Bluhm, and Simon.

"London, 17th March, 1815."

—That the freight due from the consignees of the goods laden on board the said ship *Rover* in respect of such goods, amounted to 457*l.* 15*s.* 6*d.*, and was received from them by the said *Joseph Osy*; and that on the 1st day of *March* 1815, the said *Joseph Osy*, in obedience to the instructions contained in the said letter, remitted to the said defendants the sum of 72*l.* as the balance, (with the exchange theron,) after deducting the sum of 410*l.* as paid for the plaintiff's freight, prime and hat-money: that the plaintiff received from the said *Joseph Osy*, at *Antwerp*, the sum of 151*l.* 13*s.* 6*d.* in cash, in part payment of the said freight, and for the remainder the following bill of exchange:

[260]

"*Exchange for 258*l.* 6*s.* 6*d.* sterling.*

"*Antwerp, 18th April, 1815.*"

"At sixty days' date pay this first of exchange (second not paid) to the order of Mr. *Stephen Marsh*, two hundred and fifty-eight pounds six shillings and sixpence sterling value in account, which place to account, as per advice.

"*Joseph Osy.*"

1815.

MARSH
v.
PEDDER.

[261]

—That the said bill being remitted by the plaintiff to his owner, was duly presented to and accepted by the said *Baker, Mant, and Page*, on the 24th day of the same month of *April*, and fell due on the 20th day of *June* last: that the said *Joseph Osy* stopped payment on the 9th day of *May* last, and the said *Baker, Mant, and Page* stopped payment on the 13th day of *May* last: that the plaintiff arrived in *England* on the 29th day of *April* last: that on the 15th day of *May* or thereabouts, the plaintiff applied to the defendants for payment of the residue of the freight, primage, and hat-money: that the plaintiff had upon a former occasion been chartered by the defendants, and addressed to the said *Joseph Osy*, under circumstances similar to the present, upon which occasion no application was made by the plaintiff, or any person on his behalf, to the defendants, for payment of freight, primage, or hat-money, the same having been paid by the said *Joseph Osy*.



Shepherd S. G. for the plaintiff contended, that the defendants were not discharged by the bill of exchange, and relied upon *Owenson v. Morse*, 7 T. R. 64. *Tapley v. Martens*, 8 T. R. 451., and *Everett v. Collins*, 2 Campb. 515.

Best Serjt. and *Scarlett* contrà, pointed out as distinguishing circumstances in this case, that the plaintiff had voluntarily taken a bill upon third persons; that the bill was duly accepted by the drawees; and that it was not till their insolvency that any demand was made upon the defendants, or they had notice even of the freight not having been regularly paid at *Antwerp*. The plaintiff might have been paid there if he had pleased. *Osy* having collected the freight from the consignees of the goods, had funds for the express purpose of paying him,—a fact of which he could not be ignorant. The credit was given by him to *Osy*, and not by the defendants, who desired the balance of the freight, after payment of the 410*l.* to be remitted to them. It was the plaintiff's duty to have procured payment of the freight at *Antwerp*, where by the charter-party it is made payable. Thus the money was allowed to remain in *Osy's* hands through the default of the plaintiff, and he ought to bear the loss.

[262]

GIBBS C. J.—This is a dry question of law upon the facts admitted, whether the defendants be still liable upon the charter-party for the freight which remains unpaid. Let us see what their covenant is. They covenant that the master should be paid by them or their assigns, on a right and true delivery of the cargo, the sum of 410*l.*: I think he was not bound to insist on being paid in cash at *Antwerp*. “On delivery of the cargo” means after the cargo should be delivered. The defendants must still pay the freight, unless in point of law the whole has been already paid. Now, suppose the defendants themselves had paid the plaintiff partly in cash and partly by a bill of exchange, which turned out to be good for nothing, it seems to be admitted that they would not be discharged. The result is the same where the payment is made by an agent. If the bill is not paid, the principal remains liable. *Osy* here was unquestionably the agent of the defendants, and settled with the plaintiff in that character. Circumstances may vary the effect of taking a bill of exchange either from the agent or the principal. If the party having the offer of cash, merely for his own accommodation prefers a bill of exchange, upon that he must seek his remedy. It is not stated here that the plaintiff knew the contents of the letter which he delivered to *Osy*. It is not stated, nor is it to be inferred, that any offer to pay the whole of the freight in cash was ever made to him. I am therefore of opinion, that the plaintiff did not take the bill of exchange in full payment and satisfaction of the sum of 258*l.* 6*s.* 6*d.*, and that for that amount he is enabled to recover in this action.

1815.

MARCH
v.
PEDDER.

[263]

Verdict accordingly.

Shepherd S. G., Lens Serjt. and Campbell for the plaintiff.*Best Serjt. and Scarlett* for the defendants.

C A S E S

ARGUED AND DECIDED

AT

NISI PRIUS

IN

THE COURT OF KING'S BENCH,

At the Sittings after

Michaelmas Term,

In the Fifty-sixth Year of GEORGE III. 1815.

FIRST SITTINGS AFTER TERM AT WESTMINSTER.

*Wednesday,
Nov. 29.*

DOR. d. GUNSON v. WELCH.

In ejectment for a house, to shew that it is situate in the parish mentioned in the declaration, it is *prima facie* evidence, that the place in which it stands is watched by the watchmen of that parish.

EJECTMENT for a house alleged to be in the parish of *Saint Martin in the Fields.*

The title of the lessor of the plaintiff being made out, a difficulty arose in proving that the house was situate in the parish mentioned in the declaration.

The attorney swore, that before commencing the ejectment he inquired of various persons in the neighbourhood, who all informed him that the house was in the parish of *St. Martin*

in the Fields; and it was contended that this was evidence of reputation, which is admissible upon such a question. But

1815.

Doe d.
GUNSON
v.
WELCH.

Lord ELLENBOROUGH held that it was insufficient.

It was then proved that the watchmen of the parish of *St. Martin in the Fields*, always watch the court in which the house stands, as being within the parish.

This was held sufficient, *prima facie* evidence; and being uncontradicted, the lessor of the plaintiff recovered.

Scarlett and Comyn for the lessor of the plaintiff.

Reader, for the defendant.

[Attorneys, *Morshead and Welsh*.]

PHILLIPS *v.* BEER.

[266]
Saturday,
Dec 1.

USE and occupation.

Plea, the general issue, except as to *sl.*, and as to that a tender, which was admitted.

The question arose respecting certain payments of landlord's property-tax by the defendant, which he now sought to deduct from the amount of the rent.

To prove these, the collector was called, who stated that he had received the money from the defendant, and signed the receipts for it, which were shewn to him.

It was contended for the plaintiff, however, that this evidence was insufficient, and that the assessment ought to be

In an action for rent, to entitle the tenant to deduct the property-tax, it is sufficient to prove the payments by the collector, without producing the assessment.

1815.
PHILIPS
v.
BEER.

produced, or some other proof given of the money paid by the defendant and received by the collector, actually being due for landlord's property-tax ~~in respect of~~ the premises in question. But

Lord ELLENBOROUGH considered the evidence sufficient, and the plaintiff was nonsuited.

[267] *Topping and Marryat*, for the plaintiff.

Garrow A. G. and Espinasse for the defendant.

[Attorneys, Tomlinson and Johnson.]

Wednesday,
Dec. 13.

DAVIS v. REYNOLDS.

If the purchaser of goods to be paid by bill, after giving his acceptance, during the time of credit, and while the goods are in transitu, sells them to a third person for a valuable consideration, without transferring any bill of lading to him, the right of the original vendor to stop the goods in

[268]
transitu is taken away.

TROVER for flax.

This flax was purchased in September last by *Cooper & Co.* merchants in *Loulon*, from *Peacock & Co.* at *Hull*, payable by bill at two months. It was accordingly shipped for the port of *London*, and the bill was accepted. On the 2d of October it was resold by *Cooper & Co.* to the plaintiff, who paid them for it in cash on the 5th, and took a receipt from them specifying the terms of the bargain. A few days afterwards it arrived, and was landed at the defendant's wharf. By this time *Cooper & Co.* had become insolvent, and the flax being demanded by *Peacock & Co.* the consignors, was delivered to them upon an indemnity.

The plaintiff's counsel in opening the case proposed to produce the bill of lading, and to shew that it had been indorsed to the plaintiff before the insolvency of *Cooper & Co.*: but as it was unstamped it could not be received in evidence.

Bolland for the defendant, allowed that if the indorsed bill of lading had been regularly in evidence, this case would have come within the authority of *Cumming v. Brown*, 9 East, 506. But he contended that in the absence of the bill of lading, there was no evidence of a transfer of the property to the plaintiff, so as to defeat the right of the consignor to stop *in transitu* on the insolvency of the consignee. The decisions upon this subject had proceeded on the ground that the possession of the bill of lading is symbolically the possession of the goods; but without it, the property could not vest in the consignee, and he could not transfer it to another. He relied upon *Hunt v. Ward*, 3 T. R. 467.

1815.
—
DAVIS
v.
REYNOLDS

Lord ELLENBOROUGH.—I think *Cooper & Co.* had a power to transfer the property, so as to defeat the right to stop *in transitu*. They were the purchasers of the flax, and had completed their title to it by accepting the bill of exchange. The property had vested in them, therefore, or it would have been in abeyance till the time of credit had expired, and the bill had been paid or dishonoured. The receipt given by *Cooper & Co.* to the plaintiff was a good note in writing, within the statute of frauds, and at that time he had no reason to suspect their title. *Peacock & Co.* the consignors, were then in the situation of paid vendors. Therefore, when the flax was deposited at the wharf, I think it was received by the defendant on account of the plaintiff, and ought to have been delivered up to him.

[269]

Park and Gurney for the plaintiff.

Bolland for the defendant.

[*Attornies, Isaacs and Jones.*]

1815.

Wednesday,
Dec. 13.

ABRAHAM v. DU BOIS.

To prove
that a bill
of exchange
purporting
to be drawn
abroad, was
in point of
fact drawn
in England,
and is
therefore
void for
want of a
stamp, it is
not suffi-
cient barely
to shew
that the
drawer was
in England
at the time
the bill
bears date.
[270]

THIS was an action on a bill of exchange dated *Paris*,
1st March 1815.

The defence was, that the bill had been drawn in *London*, and was therefore void for want of a stamp.

In support of this it was proved, that the drawer was in *London* on the 3d of *March* at 11 o'clock in the forenoon.

Lord ELLENBOROUGH.—It is not very probable that the bill was drawn at *Paris* on the 1st of *March*; but if that were proved ever so distinctly, it would not alone be enough to shew that the bill was drawn in *England*. To draw a bill here purporting to be drawn abroad, for the purpose of evading the stamp duties, is a very serious offence, and the fact must be made out by distinct evidence.

Verdict for the plaintiff.

Garrow A. G. and Comyn for the plaintiff.

Topping and Curwood for the defendant.

[Attorneys, *Abraham and Comyn*.]

HENRY and Others v. STANIFORTH.

A prospec-
tive licence
from the
crown for
a voyage
from an

THIS was an action on a policy of insurance at and from
Riga to *Great Britain*;—with a count for money had
and received.

enemy's country, granted after the voyage has commenced, is insufficient to render it legal. But if the parties to a policy of insurance on this voyage contemplated the obtaining of a licence, the premium may be recovered back by the assured from the underwriters.

Two questions arose : 1st, whether the voyage was properly legalized, this country having been then at war with *Russia*; and if not, 2dly, whether the premium could be recovered back ?

1815.

HENRY
v.
STANIFORTH.

On the 28th of August the ship was chartered at *Petersburgh* by the assured. On the 3d of September they wrote the order for the insurance to plaintiffs who reside at Hull, desiring them at the same time to procure a licence. On the 10th of September, the ship began to load, and she sailed from *Riga* on the 3d of October. The letter of 3d September was not received by the plaintiff till the 5th of October. On the 7th a licence was procured, "to remain in force six months from the date thereof, and no longer." The policy was effected on the 20th of November. The ship was lost in the voyage home.

271]

It was contended for the plaintiff, that the licensee had a retrospective operation, and legalized the adventure from its commencement ; and that at any rate, the premium was recoverable, the parties having had no intention to violate the law : — while the other side insisted that the voyage was illegal, being commenced before the licence was granted, which was not even intended to have any retrospective operation ; and that the contract of insurance being consequently illegal, no action could arise out of it.

Lord ELLENBOROUGH.—I think it is impossible to say that this adventure which commenced on the 10th of September was legalized by a licence dated the seventh of October, "to remain in force 6 months from the date thereof." But I am of opinion that the underwriters have no right to retain the premium. Here no contravention of the law was meditated by any of the parties concerned. If the voyage had been retarded, or the licence had been accelerated but a short time, all would have been right. On the 20th of November it was not known in London when the ship sailed from *Riga*, and the policy was effected under an ignorance of the facts. The risk was believed to be legal. The underwriters have not succeeded in shewing that they committed any crime in re-

[272]

1815.

HENRY
v.
STAN-
FORTH.

ceiving the premium ; and therefore they must restore it to the assured, who have failed in obtaining the indemnity which it was meant to purchase.

Verdict accordingly, which was afterwards confirmed by the Court of K. B.

Garrow A. G. and F. Pollock for the plaintiffs.

Park and Scarlett for the defendant.

[Attorneys, *Weston* and *Trower*.]

Thursday, Dec. 11. WATSON and Wife, Administratrix, &c. of MAXWELL,
v. KING.

Trover lies
for an un-
divided part
of a chattel.

[273]

A power
of attorney,
though
coupled
with an in-
terest, is
instantly
revoked by
the death of
the grantor;
and an act
afterwards
bond fide
done under
it, by the
grantee, be-
fore notice
of the death
of the grantor,
is a nullity.

If a plain-
tiff suing in
trover as
administra-

TROVER for three fourths of the ship *Little William*.

Maxwell, the intestate, being owner of three fourth parts of the ship in question, in April 1813 gave a power of attorney to one *Ward*, to whom he was largely indebted, authorizing him to sell them. He then sailed in another ship called the *Effort* for *Bermuda*. In the month of February 1814 he was with this ship at *Jamaica*, and sailed in her for *Eng-*
land with a large fleet under convoy of H. M. ship *Valiant*. A hurricane soon after arose, in which several of the fleet foundered ; the *Effort* parted company on the 7th of March and was never more heard of. On the 8th of June following, *Ward*, under the power of attorney, sold *Maxwell's* interest in the *Little William* to the defendant, and indorsed the register in *Maxwell's* name.—Mrs. *Watson* was described as administratrix in the declaration, which contained a profert of the letters of administration.

If a plain-
tiff suing in
trover as
administra-
tor is so described on the face of the declaration, and makes a profert in curia of the letters of administration, it is unnecessary, on not guilty pleaded, to produce them at the trial, although the cause of action accrued after the death of the intestate.

Topping for the defendant took three objections in point of law: 1st, That trover would not lie for the undivided part of a chattel; 2dly, That the power of attorney being coupled with an interest, was not revoked, even supposing *Maxwell* to have died before the sale; and 3dly, That at all events, the plaintiff's had not entitled themselves to sue as his representatives, as they had not given the letters of administration in evidence at the trial, although the conversion was alleged to have taken place after the intestate's death.

1815.
WATSON
_{e.}
KING.

Garrow A. G. for the plaintiff, offered to put in the letters [274] of administration, if this was thought necessary.

Lord ELLENBOROUGH.—If the jury shall be of opinion that *Maxwell* perished in the storm, I think the plaintiffs are in point of law entitled to recover. 1. An undivided part of a chattel may be tortiously converted to the use of a wrong doer; and where that is the case, I see no reason why trover may not be maintained by the real owner. No other remedy is suggested. 2. A power coupled with an interest cannot be revoked by the person granting it; but it is necessarily revoked by his death. How can a valid act be done in the name of a dead man? (a) 3. And as a *profert in curia* is made of the letters of administration, I must suppose that they give sufficient evidence of the plaintiff's representative character till the contrary is proved. (b)

The plaintiffs had a verdict.

A motion was made for a new trial, on the ground that the letters of administration were not produced; but there having been an offer to produce them, the Court refused to entertain the question.

(a) See *Wallace v. Cook*, 5 Esp. 117.

(b) See *Thynne v. Protheroe*, 2 M. & S. 553.

1815.

WATSON
v.
KING.
"

Garrow A. G. and *Campbell* for the plaintiffs.

Topping and *Taddy* for the defendant.

[Attorneys, *Kearsey & Spurr* and *Tomlinsons.*]

The official letter of the commander of a convoy to the admiralty, at the end of the voyage, seems good evidence of the facts therein stated respecting the ships under convoy.

N. B. To prove that the *Effort* sailed under convoy of the *Valiant*, that the fleet encountered a storm, and that the *Effort* parted company; not only the log-book of the *Valiant*, but the captain's official letter at the end of the voyage, produced from the Admiralty, was read in evidence without objection.

Vide *D'Israeli v. Jowett*, 1 Esp. 427. *Johnson v. Ward*, 6 Esp. 47.

DIGBY v. ATKINSON and Another.

If after the expiration of a written lease containing a [276] covenant by the tenant to keep the premises in repair, he verbally agrees to hold over, paying an additional rent, nothing more

A SSUMPSIT.

The declaration alleged that in consideration that defendants had become and were tenants to plaintiff, of a warehouse and store-cellars, &c., the defendant undertook from time to time, and at all times during the continuance of the said tenancy, well and sufficiently to support, maintain, uphold, repair, amend, pave, cleanse, and keep the said warehouse and store-cellars, and every part thereof, with the appurtenants in, by, and with all manner of needful and necessary reparations, cleansings, and amendments, and in parti-

being expressed between the parties respecting the terms of the new tenancy, he is presumed to hold under the covenants of the former lease, as far as they are applicable to his new situation; and if the premises are afterwards burnt down by accidental fire, he is bound to rebuild them.

If a lease contains a covenant by the tenant to keep the premises in repair, and a covenant to insure them for a specific sum against fire; — on their being burnt down, his liability on the former covenant is not limited to the amount of the sum to be insured under the latter.

cular to continue all the nine props then standing in the said store-cellars upon stone bases under the girders: an averment followed, that defendants had from thence hitherto continued tenants to plaintiff of the premises;—with a breach stating, that on 25th *June* 1814, and continually afterwards, defendants had suffered and permitted the said warehouse and store-cellars, with the appurtenants, to be and continue wholly ruinous, prostrate, fallen, and in complete decay for want of the needful and necessary upholding, repairing, and rebuilding thereof.

1815.

DIGBY

^{n.}

ATKINSON.

By indenture of lease bearing date 24th *December* 1790, the plaintiff's father demised the premises in question to *Francis Armstrong* for 21 years from the *Michaelmas* day preceding, at the yearly rent of 48*l.*, and the lessee covenanted to keep the premises in repair, in the terms of the promise stated in the declaration, and likewise to insure them against fire for the sum of 600*l.* The defendants purchased the lease from *Armstrong* in *December* 1795, and continued to occupy the premises, and to pay the reserved rent of 48*l.* till *Michaelmas* 1811, when the term expired. The defendants still remaining in possession, verbally agreed with the plaintiff, who had succeeded to the reversion as heir to his father, to continue tenants to him of the premises at the advanced rent of 132*l.* 6*s.* *per annum*. Nothing appeared to have been expressed between them respecting any of the other terms of the holding. On the 25th of *June* 1814, the premises were accidentally burnt down,—till which time the defendants still occupied them, regularly paying the plaintiff the advanced rent. On the 22d of *October* 1812, they sent him a proposal to take a renewed lease of 7, 14, or 21 years, at the rent of 120*l.*; and threatened, if this was not accepted, to give him a notice to quit; but he declined to grant a lease on these terms, and the verbal agreement was still adhered to.

[277]

Park for the plaintiff insisted, that the defendants after the expiration of the lease impliedly held under the covenants which it contained, and were therefore bound to rebuild the premises.

1815.

*Digby v.
Atkinson.*

[278]

Garrow A. G. contrà insisted, that by the parol agreement a new holding was created, without any reference to the former lease. The increase of the rent was decisive to shew, that the contract was entirely new, and unconnected with any other. The same thing might be inferred from the proposal to grant a new lease. At any rate, the defendants could not be liable for more than the 600*l.* which by the covenant the tenant was to keep insured upon the premises.

Lord ELLENBOROUGH.—Where the tenant holds over after the expiration of the term, he impliedly holds subject to all the covenants in the lease which are applicable to his new situation. In all my practice, it was the invariable usage in such cases to declare in assumpsit on the implied promise raised by the continued holding. The mere advance of the rent, in my opinion, makes no difference. The parties must still be supposed in other respects to have had reference to the lease. The advanced rent incorporated the old terms with the new contract. Therefore, the premises being burnt down by accidental fire, the defendants were bound to rebuild them.—Nor do I think their responsibility limited to the 600*l.* The covenant to insure was introduced for the security of the landlord, leaving the tenant still absolutely liable on the covenant to repair.

Verdict accordingly.

Park and Marryat for the plaintiff.

Garrow A. G. and *Lawes* for the defendants.

[Attorneys, *Rivington and Jackson.*]

Vide *Bullock v. Dommitt*, 6 T. R. 650. *Doe v. Bell*, 5 T. R. 471. *Fergusson v. ——*, 2 Esp. R. 590. *Rooke v. Warth*, Ves. sen. 462. *Pym v. Blackburn*, 3 Ves. jun. 34.

1815.

DICKINSON v. LILWALL and Another.

Friday,
Dec. 15,

A SSUMPSIT for not delivering goods sold by the defendants to the plaintiff.

The defendants, who are dealers in *Irish* provisions, on the 3d or 4th of *July* last, gave authority to one *Grainger*, a broker, to sell for them 250 firkins of *Waterford* butter, at 100s. per ewt. On the 6th of the same month he offered to sell this butter to the plaintiff, who agreed to take it at 100s. if the defendants would not be contented with 99s. *Grainger* immediately wrote out a sold note at 100s. which he signed. He then carried it to the defendants' counting-house. They said they were surprised he should have sold the butter, as his authority had expired, and they had before disposed of it themselves to another purchaser. They then returned him the sold note, and he tore it. He did not enter the contract in his book, nor make out a bought note for the plaintiff, but he communicated to him what had passed; when the plaintiff insisted upon the contract being fulfilled.

An objection being made, that this was not a contract binding upon the defendants, even supposing that the broker had authority from them to enter into it, Lord *Ellenborough* saved the point for the opinion of the Court.

The defence chiefly relied upon, was that the broker's authority had expired, not having been renewed after the 4th of *June*.

[280]

To substantiate this, a great number of *Irish* provision merchants and brokers were called, who all swore that by the usage in that trade in which there are great fluctuations of price, a general authority to sell expires with the day on which it is given, and that unless it be expressly renewed the following day, the principal may sell the goods himself, without sending notice to the broker, or expressly revoking his authority.

Held to be a lawful usage in the Irish provision trade, that a general authority to a broker to sell expires with the day on which it is given, and that a contract for the sale of the goods afterwards entered into by the broker, is not binding on the principal.

1815.

DICKINSON
v.
LILWALL.

Lord ELLENBOROUGH held that evidence of this usage was receivable in the present case to limit the general authority given by the defendants to *Grainger*; that the usage in itself was reasonable and lawful; and that the present action therefore could not be maintained.

Plaintiff nonsuited.

Garrow A. G. and *Campbell* for the plaintiff.

Park and *Comyn* for the defendant.

[Attorneys, *Osbaldiston* and *Clutton*.]

[281]
Friday,
Dec. 15.

ELTON v. BROGDEN.

A temporary lameness, rendering a horse less fit for present service, is a breach of a warranty of soundness.

THIS was an action on the warranty of a horse.

The plaintiff proved that the horse was lame at the time of the sale.

The defendant allowing this, undertook to prove that the lameness was of a temporary nature, that he afterwards recovered, and has since become in all respects sound.

Lord ELLENBOROUGH.—I have always held and now hold that a warranty of soundness is broken, if the animal at the time of the sale had any infirmity upon him, which rendered him less fit for present service. It is not necessary that the disorder should be permanent or incurable. While a horse has a cough, I say he is unsound, although that may either be temporary or may prove mortal. The horse in question having been lame at the time of the sale, when he was warranted to be sound, his condition subsequently is no defence to the action.

Verdict for the plaintiff.

Garrow A. G. and *Gaselee* for the plaintiff.

Topping and *Scarlett* for the defendant.

1815.

GRAHAM v. GRILL.

Monday,
Dec. 18.

THIS was an action on several bills of exchange.

Pleas, 1. non assumpsit; 2. bankruptey generally; 3. a spe-
cial plea of bankruptey. Replication to last plea, that de-
fendant had been discharged under a prior commission, and
had not paid 15s. in the pound under the second. Rejoinder,
that he had not been discharged under the former commis-
sion; and issue thereupon.

No sufficient notice had been given to the defendant to
produce his certificate under that commission.

Topping for the plaintiff proposed to support the affirmative
of the issue upon the discharge, by proving that the defend-
ant had submitted to the former commission, and putting in
his affidavit of conformity upon which the certificate was
granted.

Lord ELLENBOROUGH.—This might be good secondary
evidence, but you have not laid the proper foundation for ad-
mitting it. Issue is joined upon a specific document, and that
must either be proved, or evidence must be regularly given
of its contents. Notwithstanding the affidavit of conformity
the certificate may never have been signed by the Lord Chan-
cellor.

Nonsuit.

Where, on
the defend-
ant plead-
ing his
bankrupt-
ey, issue is
joined on
the fact
whether he
had been
discharged
under a for-
mer com-
mission, the
plaintiff
must shew
that the de-
fendant ob-
tained his
certificate
under that
commission
either by
the regular
proof of it,
or by sec-
ondary
evidence,
after a no-
tice to pro-
duce it :
Without
such notice,
the defend-
ant's affida-
vit of con-
formity,
under the
[283]
former
commis-
sion, held
insufficient.

Topping, and *Taddy* for the plaintiff.

Marryat for the defendant.

[Attornies, *Tomlinson and Drucci*.]

Vide *Henry v. Leigh*, 3 Campb. 499.

1815.

*Tuesday,
Dec. 19.***M'DOUGLE v. ROYAL EXCHANGE ASSURANCE.**

To constitute a *stranding* within the meaning of that term in a policy of insurance, it is not enough that the ship strikes on a rock and falls on her beam ends.

THIS was an action on a policy of insurance "at and from *Barnstaple* to *London* being on 474½ quarters of oats valued at 540*L.*;" and, "in case of particular average, occasioned by the ship being stranded, it was agreed to pay so much thereof as should exceed 5*l. per cent.*"

The question was, whether there had been a *stranding* within the meaning of this clause in the policy.

[284] In the course of the voyage the ship was forced to put into the harbour of *New Grimsby*. In coming out from thence with a pilot on board, she struck upon a rock, about a cable and a half's length from the shore. The captain stated that she, in consequence fell on her beam ends, and remained upon the rock a minute and a half. She then proceeded to *St. Ives*, which she reached the same evening. On her arrival there, it was discovered that she made a great deal of water, although she had been tight before the accident she met with, and the plank of her bottom was shattered where she had struck upon the rock.

Lord ELLENBOROUGH—I am of opinion that this was not a stranding. *Ex iei termini* stranding means lying on the shore or something analogous to that. To use a vulgar phrase, which has been applied to this subject, if it is "touch and go" with the ship, there is no stranding. It cannot be enough that the ship lay for a few moments on her beam ends. Every striking must necessarily produce a retardation of the ship's motion. If by the force of the elements she is run aground, and becomes stationary, it is immaterial whether this be on piles, on the muddy bank of a river, or on rocks on the sea shore; but a mere striking will not do, wheresoever that may happen. I cannot look to the consequences without considering the *causa causans*. If the assured mean to be indemnified against a loss arising in this manner, they must introduce a

a clause making the underwriters liable for a particular average occasioned by the ship striking on a rock. There has been a curiosity in the cases * about stranding not creditable to the law. A little common sense may dispose of them more satisfactorily.

1815.

M'DOUGLE
v.
ROYAL EX-
CHANGE
ASSURANCE
[*285]

The special jury, on a question being put to them by His Lordship, said they were likewise clearly of opinion that this was not a stranding.

Plaintiff nonsuited.

Scarlett and Heath for the plaintiff.

Garrow A. G., Park, and Bosanquet Serjt. for the defendants.

[Attorneys, *Burn and Kaye*.]

PHELSON v. KNELLER.

Tuesday,
Dec. 19.

THIS was an action against the drawer of a bill of exchange; and the question was, whether the plaintiff was excused for not having given him notice of the dishonour of the bill.

It was proved that a few days before the bill became due the defendant called at the counting house of the plaintiff, whom he knew to be the holder; and being asked the place of his residence, he said he had no regular residence, he was living among his friends, and he would call and see if the bill was paid by the acceptor.

The drawer of a bill of exchange, a few days before it becomes due, states to the holder that he has no regular residence, and that he will call and see if the bill is paid by the acceptor.— Held that under these circumstances he was not entitled to notice of its dishonour.

Lord ELLENBOROUGH.—This dispensed with notice, and threw upon the defendant himself the duty of inquiring if the bill was paid.

Verdict for the plaintiff.

[286]

1815.

Garrow A.G. and De Haney for the plaintiff.

PHIPSON
v.
KELLER.

Marryat for the defendant.[Attorneys, *Willoughby* and *Fothergill*.]

Thursday,
Dec. 21. **WYNDHAM** and Another, Assignees of Sir **WILLIAM ALEXANDER FLETCHER**, Knt. a Bankrupt, *v.* **PATTERSON**.

If a trader leaves England for the purposes of trade, but remains abroad with intent to delay his creditors, he thereby commits an act of bankruptcy, under the words of I.J.A. 1. c. 15. s.2. "otherwise absent himself."

MONEY had and received.

The chief question in this case was as to the act of bankruptcy.

Sir *William Alexander Fletcher* was a merchant in *London*. In *July* 1814, he went to *Ireland*, where he had large mercantile concerns, for the purpose of collecting debts that were due to him. From thence he appeared to have passed over into *France* in the Month of *August*, on account of some events which had happened to him while in *Ireland*. He immediately repaired to *Paris*, from whence he wrote several letters to a gentleman in *London*, which were read in evidence. In the first, dated 9th of *September*, he says, "It is only now that the confusion of my ideas subsiding after the rest and calm of a few days, permits me to give an account of my proceedings. Your letter of 30th *July* alarmed me very much. The sum I could collect fell infinitely short of both my expectations and yours. Had I returned to *London*, and given even this to you, I was at the mercy of others." In another, written a few weeks after, he says, "Never shall I see my country again. It is my fixed resolution, were it to cost me my life. Therefore on this point it is useless to urge

[287]

me farther. Should any hostile proceeding take place, I shall receive the earliest information, and instantly leave Europe; nor shall any trace of the existence of such a person remain." WYNDHAM
v.
PATTERSON

The commission was sued out on the 18th of *March* 1815.

Garrow A. G. contended that Sir *W. A. Fletcher* had not committed an act of bankruptcy within the meaning of any of the statutes upon this subject. By "departing the realm" is meant the realm of *England*, and to make that an act of bankruptcy, the delaying of creditors must have been the motive: but in the present case, Sir *W. A. Fletcher* left *England* for *Ireland*, for the benefit of his creditors, that he might collect money to pay them.

Lord ELLENBOROUGH.—The statute 1 *Ja. 1. c. 15. s. 2.* enacts, that if any person using the trade of merchandize, who shall depart the realm, or begin to keep house, or otherwise to absent himself, to the intent, or whereby his creditors may be defeated or delayed for the recovery of their just and true debts, shall be adjudged a bankrupt. I think this gentleman has *absented* himself within the meaning of the statute. Whatever his intentions were in first going to *Ireland*, when he reached *Paris*, he had formed the resolution for ever to renounce his country. He was then in embarrassed circumstances, and his object appears to have been to withdraw himself from the importunity of his creditors, whom he was unable to satisfy. Never having returned to his mercantile establishment in *London*, or taken any steps to settle his affairs, if he did not depart the realm with intent that his creditors should be defeated and delayed, has he not otherwise *absented* himself for that purpose; and must not this be considered a case in which the remedy of a commission of bankruptcy was meant to be provided by the legislature?

[288]

The plaintiffs had a verdict; and the Court of K. B. in the ensuing term, refused a rule to shew cause why it should not be set aside.

1815.

Park, Scarlett, and Bolland for the plaintiffs.

WYNDHAM
v.
PATTERSON
 [*289]

Garrow A. G., Topping, and Reynolds for the defendant.[Attorneys, *Parther and Hackett.*]

N.B. There seems to be a technical difficulty in giving this effect to an absence abroad, that an act of bankruptcy is considered a crime committed within the realm.

Vide *Ramshottom v. Lewis*, 1 Camp. 279.

Friday,
Dec. 22.

CULLEN *v.* BUTLER.

One English ship fires at and sinks another under the mistaken notion that she is a French privateer. This is not a loss by the perils of the seas.

ACTION on policy on goods in the ship *Industry*, at and from *London* to the *Canary Islands*.

The first count of the declaration alleged a loss generally by the perils of the seas; and to this the defendant pleaded the general issue. The 2d count stated, that the ship with the goods on board was on the high seas, by the perils insured against, (that is to say,) by being fired at and pierced with shot by persons on board a certain other ship or vessel called the *Midas*, sunk and totally lost. To this the defendant demurred, and the plaintiff joined in demurrer.

While the *Industry* was proceeding on her voyage, being off *Lisbon* about nine at night, when it was dark, she fell in with another ship, which proved to be the *Midas*, an armed merchantman from *London*. The *Midas* hailed. The captain of the *Industry* did not hear what was said, but supposing the name of his ship was asked answered, "the *Industry* of "London, bound for *Teneriffe*." The *Midas* again hailed. The Captain of the *Industry* mistakenly thought he was desired to heave to, and he did so. The *Midas* supposed the *Industry*

[290]

to be a French privateer about to board, and fired several shot at her, which hit her between wind and water, and sent her to the bottom. The *Industry's* crew were taken on board the *Midas*, and found her prepared for action.

1815.

CULLEN
p.
BUTLER.

Garrow A. G. for the plaintiff, contended, that this was like *collision*, and was clearly a peril of the sea.

Lord ELLENBOROUGH.—This was a peril upon the sea, but not a peril of the sea. With respect to collision, the loss is occasioned by the elements which bring the ships in contact in spite of the exertions of the crews to keep them asunder. The firing here was voluntary. Suppose a ship under sail is sunk by a land battery, is that a loss by the perils of the sea? And can it make any difference that the shots are fired with premeditation and design from another vessel? The assured may be entitled to recover from the underwriters; but not on this count of the declaration.

Garrow A. G., Topping, and Richardson for the plaintiff.

[291]

Park, Scarlett, and Barnewall for the defendant.

HEYWOOD and Others, Assignees of HUMBLE, a Bankrupt, and GLADSTONE and Others, Assignees of HOLLAND, a Bankrupt, v. WARING and Another, Assignees of HOLMES, a Bankrupt.

Friday,
Dec. 22.

THIS was an issue directed by the Lord Chancellor, to try "whether *Humble and Holland* had any *lien*, and to what amount, at the time of their bankruptcy, on the proceeds of the cargo of a ship called the *Elegante*, then in the hands of certain persons using the firm of *James Waring and Co.*"

or their produce, must be found in the negative, if J. S. was not in possession of the goods or their produce, whatever equitable interest he might have in them.

An issue
out of Chan-
cery, on
the question
whether J.
S. had at a
particular
time any
lien on cer-
tain goods

1815.

~~HENWOOD
v.
WARING.~~

[292]

[293]

The two bankrupts carried on business in partnership together at *Liverpool*, under the firm of *Humble and Holland*. *Holland* was at the same time in partnership with *Frederick Holmes* at *Messina*, under the firm of *Holland, Holmes and Co.* There was likewise a firm at *Malta* of *Holland and Co.* consisting of *Holland* and four other persons. In the year 1810, *Holland, Holmes and Co.* shipped a cargo on board the *Elegante* at *Messina*, consigned to *James Waring and Co.* of *London*, and on the 15th of *July* wrote to them as follows: "This vessel and cargo we have disposed of to Messrs. *Holland and Co.* of *Malta*, and we have given them a letter to you to that effect. A copy of it we inclose, and we fully confirm the contents, requesting you to account to them alone for the balance." In the letter given to *Holland and Co.* addressed to *James Waring and Co.*, *Holland and Holmes* say, "in consequence of an arrangement with Messrs. *Holland and Co.* of *Malta*, we hereby request you will account to them for the net proceeds of the cargo consigned to you by us, per our packet ship *Elegante*." On the 23d August 1810, *Holland, Holmes, and Co.*, *Holland* being then at *Messina*, wrote to *James Waring and Co.* saying, "Messrs. *Holland and Co.* of *Malta*, having failed in performing part of the agreement in faith of which we had directed you in our respects through them of the 5th ultimo to pay to their order the balance that may be accruing to us from net proceeds of *Elegante's* cargo detailed, we are under the necessity of revoking those orders, and we do hereby revoke and rescind our said letter of the 15th *July* in their favour; and request you to place the net proceeds of her cargo, or of both cargo and slip, (in case of loss or capture of her,) to the credit of our account current, and not to pay any part thereof to Messrs. *Holland and Co.* or their order, notwithstanding any thing they may write to the contrary, or that may be stated to you by Mr. *Swinton Coalhurst Holland*, who is at present (as we are given to understand) established in business in your city. On account of the net proceeds of cargo by that vessel, or on our general account, as you may deem right to place the amount, we have taken the liberty to value on you on the 20th instant, at 30 days, for 400*l.* sterling, order of *Cumming, Pater, and Co.*; and for 100*l.* order of *John St. Ledger Hansard*, which we request that you will in any case

" honour and place to our debit in account. We have stated
 " the amount on the drafts to be an account of shipments
 " *per Elegante*, being nearly certain that this will reach you
 " before you can have executed the disposition made in ours
 " of the 15th ult., and will of course prevent your doing so;
 " and under this idea, we further request that you account to
 " Messrs. *Humble and Holland* of *Liverpool* for 3000*l.* sterling,
 " say, allow them to draw on you at three months' date for
 " that sum on our account, to be paid out of the net proceeds
 " of that vessel's cargo."

1815.

 HEYWOOD
 v.
 WARING.

At the date of this letter, *Holland, Holmes, and Co.* were indebted to *Humble and Holland* in a sum of money, above 6000*l.*, which still remains due. *Holland, Holmes, and Co.* at the same time wrote to *Humble and Holland*, and informed them of their having requested *Waring and Co.* to accept their drafts at three months' date for 3000*l.* against the proceeds of the *Elegante*. These letters to *Waring and Co.* and *Humble and Holland*, were received on the 9th of October 1810, and two days after *Humble and Holland* drew on *Waring and Co.* six bills of exchange, amounting to 3000*l.* which they refused to accept, on the ground that an attachment to the amount of 10,000*l.* had been laid on the property of *Messrs. Holland, Holmes and Co.* in their hands, by *Messrs. Holland and Co.* of *Malta*. *Waring and Co.* sold the cargo of the *Elegante*, and when the bills were drawn upon them, they had a sufficient sum arising from the proceeds to have paid the bill. This sum continued in their hands till after the respective bankruptcies of *Humble and Holland*. The attachment by *Holland and Co.* of *Malta* was abandoned, there being nothing due to them from *Holland, Holmes, and Co.* On the 25th October 1810, *Holmes* the partner of *Holland* in the house of *Holland, Holmes, and Co.* wrote the following letter, in the name of that firm, to *Waring and Co.*, but without the privity of *Holland*.

[294]

" *Messina, 25th October, 1810.*

" *Messrs. James Waring and Co.*

" *Gentlemen,*

" The purport of the present is solely to request, that if, as
 " we fully hope, the *Elegante* and her cargo come into you

1815. " hands, that you will on no account pay any part of the net
 proceeds to Messrs. *Samuel Holland*, Messrs. *Humble and Heywood* or to Mr. *J. C. Holland*, but hold the whole to our
 WARING. " credit on account, and wait our direction as to the disposal
 " of it.

" We are truly, Gentlemen,

" Your most obedient servants,

" *Holland, Holmes, and Co.*"

A commission of bankrupt issued against *Holland* in November 1810, against *Holmes* in October 1811, and against *Humble* in April 1813.

Garrow A.G. having stated these facts, contended that *Humble and Holland* had clearly a lien to the amount of 3000*l.* on the proceeds of the cargo of the *Elegante*, as the authority to receive that sum from *Waring and Co.* was coupled with an interest, *Humble, Holmes, and Co.* being indebted to them in a greater amount, and that it was therefore an authority that could not be countermanded.

Lord ELLENBOROUGH.—*Humble and Holland* may be entitled to the 3000*l.* in question; but I do not see how they can have a *lien* on the proceeds of this cargo to that or any other amount. They never were in possession either of the cargo or of the proceeds; and without possession there can be no *lien*. A *lien* is a right to hold; and how can that be held which was never possessed?

[296] *Garrow A. G.* suggested that the Chancellor by this issue, which he had himself dictated with a full knowledge of all the facts, must be understood to have directed an inquiry, whether *Humble and Holland* were entitled to the money, without considering whether they had what in strict law amounts to a *lien*.

Lord ELLENBOROUGH.—I must understand that very learned person to have used the language employed in its legal sense. His Lordship could not send the parties here to try a question of equity upon facts which are not disputed. I

can only look to see whether *Humble* and *Holland* could hold the proceeds of this cargo in satisfaction of their own debt; and they certainly could not, as neither cargo nor proceeds were ever in their possession to be held.

1815.

HEYWOOD
WARING.

Plaintiff nonsuited.

Garrow A.G., Scarlett, and Gaselee for the plaintiffs.*Park, Nolan, and F. Pollock* for the defendants.

[Attorneys, Heywood and Pasmore.]

Moses and Another v. PRATT.

[297]
Friday,
Dec. 22.

THIS was an action on a policy of insurance at and from port or ports in *Cuba* to port or ports in *St. Domingo*, and from thence to any port or ports in the United Kingdom, on the ship *Argus*, valued at 2000*l.* and her freight valued at 3000*l.*

The plaintiffs sought to recover an average loss on the ship, and a return of premium for short interest on the freight.

By a charter-party dated 7th October 1814, the plaintiffs let the *Argus* to freight to *L. Garnett* for a voyage from Liverpool to *Cuba* and *St. Domingo*, and back, and *Garnett* covenanted to load her with a complete homeward cargo, and to pay freight for the same at a stipulated rate.

The *Argus* proceeded to *Cuba* and *St. Domingo*, where no cargo was provided for her, and was guilty of a deviation by going to a port in *Jamaica* before the loss happened which the plaintiffs sought to recover.

Their right to that being abandoned, it was insisted that they were at all events entitled to the return of premium on

Where there is an insurance on freight, if the ship be chartered for the voyage, and is guilty of a deviation after sailing upon it and before any goods are loaded, the assured are not entitled to any return of premium for short interest.

1815.

the freight, no goods having ever been loaded on the freight of which the policy could attach.

**Moses v.
Pratt.**

Lord Ellenborough.—Had the ship been lost while waiting to take in a cargo, the underwriters would have been liable for the whole sum insured upon the freight. The charter-party created an interest on which the policy had attached, and there had been an inception of the risk, although no goods were put on board. Therefore there shall be no return of premium.

Plaintiffs nonsuited.

Park and F. Pollock for the plaintiffs.

Garrow A. G. and Richardson for the defendant.

[Attorneys, *Pasmore and Dennett.*]

Saturday,
Dec. 23.

MITCHELI v. SCAIFE.

A ship is
chartered
for a parti-
cular voy-
age for a

[299]
gross sum
by way of
freight.
The captain
signs bills
of lading
for the
cargo,
(which is
the proper-
ty of and
consigned
to a third
person),
specifying
a rate of
freight
amounting
to a less
sum than
that men-
tioned in the
charter-party.
Held that the
ship owner had no lien on the cargo beyond the
freight specified in the bills of lading.

TROVER for cotton and logwood.

The defendant being part owner of the ship *Cossack*, by a charter-party dated 9th May 1815, let her for a voyage from *Liverpool* to *Jamaica* and back, to *Abraham Garnett*, who covenanted "to pay 3300*l.* for the freight and hire of the said vessel for the said voyage, together with 5*l.* per cent. primage on the outward cargo, and the customary *West Indian* primages on the homeward cargo;" the said freight and primages to be paid as follows: "the sum of 300*l.* part thereof at the end of one month after the vessel sailed from *Liverpool*, by a bill on *London*, at two months' date; the sum of 300*l.* other part thereof to be advanced to the master of the said vessel in cash in *Kingston*; and the remainder to be paid on the delivery of the homeward cargo at *Liverpool*, by good and approved bills on *London* at three months' date."

The ship sailed to *Kingston* in *Jamaica*, addressed by *Garnett* to *Hector Mitchell* his correspondent, to whom he sent information of the charter-party, with instructions to purchase a homeward cargo for the ship on his account. *Hector Mitchell* accordingly purchased a homeward cargo on *Garnett's* account, and loaded it on board the ship. Of this he made out an invoice in the following form :

1815.

MITCHELL
v.
SCAIFE.

“Invoice of the cargo of the brig *Cossack*, *Hodgson* master, bound to *Liverpool*, shipped by order and for account of “*Abraham Garnett*, and to him to be delivered when payment shall have been made for the same to *William Mitchell* “of *London*.”

For this the master signed bills of lading deliverable “to “the order of the shipper or to his assigns, he or they paying “freight for the said goods at the rate of 2d. per lb. weight “for cotton, and three guineas per ton for wood, with average “accustomed.”

[300]

Hector Mitchell being a creditor of *Garnett* to more than the value of the cargo, and being afraid of his solvency, transmitted the indorsed bills of lading to his brother *William Mitchell* of *London*, the present plaintiff, and at the same time drew bills of exchange upon him for the amount of the cargo, instructing him as soon as these bills of exchange were provided for by *Garnett* to hand over to him the bills of lading. *Garnett* soon after became insolvent, and the plaintiff himself paid the bills of exchange. There was no evidence that he had any notice of the charter-party. Upon the arrival of the *Cossack* at *Liverpool*, he demanded the goods, and tendered the full amount of the freight due by the bills of lading, which, though according to the current rate of freight at the time, did not nearly amount to the sum due by the charter-party. The defendant insisted that he had a lien on the goods for this latter sum, and refused to deliver them up till it was paid.

Topping for the plaintiff allowed that there was some novelty in this question, but contended that the case came within the

1815.

MITCHELL
v.
SCAIFE.

principle of *Paul v. Birch*, 2 Atk. 621.—The bill of lading constituted the contract between the ship-owner and the shipper of the goods, or his assignee, to whom any other contract subsisting between the owner of the ship and a third person was wholly immaterial. The defendant's lien on the goods, therefore, could not be extended beyond the freight stipulated for by the bill of lading, which had been regularly tendered to him before the commencement of the action.

Garrow A. G. contra. Had the goods been consigned to *Garnett*, the defendant would clearly have had a lien upon them for the whole sum due by the charter-party. The remainder of the freight being “to be paid on the delivery of the homeward cargo at *Liverpool*,” the delivery of the cargo and the payment of the freight, are concurrent acts, and there must mutually have been a readiness to do the one before the other could be required. As the lien would have existed against *Garnett*, the present plaintiff cannot be in a better situation. The bill of lading cannot prejudice the right which the defendant would otherwise have had. The master could have no authority to enter into any contract for that purpose. *Hector Mitchell* being the agent of the charterer, it was a fraud in him to induce the master to sign bills of lading at a lower rate of freight than that stipulated for by the charter-party. The plaintiff's title is affected by the same fraud, although he is not proved to have had express notice of the charter-party. Indeed he is to be considered a mere agent of *Garnett's*, on whose account the cargo was purchased and consigned to him.

[302]

Lord Ellenborough.—Upon the facts proved I am of opinion that the ship-owner had no right to detain the cargo for more than the freight mentioned in the bill of lading. The plaintiff is the *bona fide* indorsee of the bill of lading, and having paid the bills of exchange, must be taken to be the purchaser and owner of the cargo. He is in no degree connected with any fraud upon the charter-party. He receives the bill of lading, by which the master agrees that the goods shall be delivered to him, on payment of a certain specified freight. He knew that this is an instrument which the mas-

ter has in general authority to sign, and he seems to have had no reason to suspect that this authority was not properly exercised upon that occasion. Under such circumstances, I am of opinion, that the owner of the ship cannot be heard to aver against the contract created by his own agent through the medium of the bill of lading.

1815.

MITCHELL
SCAIFE.

The plaintiff had a verdict.

Topping and Puller for the plaintiff.

Garrow A. G., Park, Scarlett, and Campbell for the defendant.

[Attorneys, *Crowder & Co.* and *Reardon & Davis*.]

Vide *Hutton v. Bragg*, 2 Marsh. C. P. Rep. 339.

The EARL of ROSSLYN and Another, Executors of the EARL of ROSSLYN deceased, *v. JODRELL*, Esquire.

[303]
Saturday,
Dec. 23.

THIS was an action of debt upon a bond, dated 26th November 1771, in the penal sum of 100*l.* executed by the defendant on his call to the bar by the Honourable Society of *Lincoln's Inn*, to the Right Honourable Sir Fletcher Norton, Knight, Alexander Wedderburn, Esquire, (the testator who survived the other obligees,) Charles Ambler, Esquire, and Sir Anthony Thomas Abdy, Baronet, Benchers of that Society.

An action at law may be maintained upon the bond usually given to the Society of Lincoln's Inn on being called to the bar, to recover arrears of "absent commons," "vacation commons," "preachers' duties" and "pensions," which have lived in the

The bond was conditioned as follows:

"Whereas the said Richard Paul Jodrell, being a member of the Honourable Society of *Lincoln's Inn* aforesaid, is now, accrued while the party has remained a member of the Society, although he has not Inn, or practised at the bar.

1815. "by order of the same Society, called to the degree of an Utter Barrister, whereby divers duties and charges may hereafter, from time to time, grow due and payable to the said Society by the said *Richard Paul Jodrell*: The condition therefore of this obligation is such, that if the said *Richard Paul Jodrell* do and shall from time to time, and at all times hereafter, during his life, duly and orderly person, pay and discharge all such debts, duties, and charges, sum and sums of money as shall grow due and chargeable upon him for pensions, preachers' duties, commons, taxes, fines, penalties, amerciaments, and all other duties whatsoever hereafter to be due or imposed upon him, by order of and according to the custom of the said Society; then this obligation to be void, or else to remain in full force and virtue."

[304]

The defendant, after craving oyer of the bond and condition, pleaded 1st, *non est factum*; and 2dly, that he did from time to time, and at all times after the making of the said writing obligatory, duly and orderly pay and discharge all such debts, duties, and charges, sum and sums of money as have grown due and chargeable upon him for pensions, preachers' duties, commons, taxes, fines, penalties, and amerciaments, and all other duties whatsoever, which, after the making of the said writing obligatory, were due and imposed upon him by order and according to the custom of the said Society, and according to the tenor and effect of the said condition of the said writing obligatory.

[305]

The replication assigned four breaches: 1st. That after the making of the said writing obligatory, and after the defendant had been so called to the degree of Utter Barrister as therein mentioned. to wit, on the 1st day of *January* 1775, at *London* aforesaid, &c. divers large sums of money grew due and chargeable upon the defendant, by order of and according to the custom of the said Society, for pensions, preachers' duties, and commons, from the end of Michaelmas Term 1771, to the end of Michaelmas Term 1774, for 3 years after the said call of the defendant, (that is to say,) the sum of 16s. for pensions for the said 3 years, at the rate of 5s. 4d. per annum;

Lord
Rosslyn
v.
Jodrell.

the sum of 30*s.* for preachers' duties for the said 3 years, at the rate of 10*s. per annum*; the sum of 14*l. 8s.* for absent commons for the said 3 years, at the rate 4*l. 16s. per annum*; and the sum of 12*l.* for vacation commons for the said 3 years at the rate of 4*l. per annum*. 2dly, That afterwards, to wit, on the 1st day of *August*, in the year of 1809, at *London, &c.* divers other large sums of money grew due and chargeable upon the defendant, by order of and according to the custom of the said Society, for pensions, preachers' duties, and commons, from the end of Michaelmas Term 1774, to the end of Trinity Term 1809, for 34 years and 3 quarters of a year (that is to say,) the sum of 9*l. 5s. 4d.* for pensions for the said 34 years and 3 quarters of a year, at the rate of 5*s. 4d. per annum*; the sum of 17*l. 7s. 6d.* for preachers' duties for the said 34 years and 3 quarters of a year, at the rate of 20*s. per annum*; and the sum of 166*l. 16s.* for absent commons for the said 34 years and 3 quarters of a year, at the rate of 4*l. 16s. per annum*. 3dly, That afterwards, to wit, on the 1st day of *August*, in the year of 1810, at *London, &c.* divers other large sums of money grew due and chargeable upon the defendant, by order of and according to the custom of the said Society, for pensions, preachers' duties, and commons, from the end of Trinity Term, 1809, to the end of Trinity Term 1810, for one year, (that is to say,) the sum of 5*s. 4d.* for pensions for the said year, at the rate of 5*s. 4d. per annum*; the sum of 10*s. per annum*; and the sum of 5*l. 8s.* for absent commons for the said year, at the rate of 5*l. 8s. per annum*. 4thly, That afterwards, to wit, on the 1st day of *June*, in the year of 1815, at *London, &c.* divers other large sums of money grew due and chargeable upon the defendant, by order of and according to the custom of the said Society, for pensions, preachers' duties, and commons, from the end of Trinity Term 1810, to the end of Easter Term 1815, for 4 years and 3 quarters of a year, (that is to say,) the sum of 11*l. 5s. 4d.* for pensions for the said 4 years and 3 quarters of a year, at the rate 5*s. 4d. per annum*; the sum of 2*l. 7s. 6d.* for preachers' duties for the said 4 years and 3 quarters of a year, at the rate of 10*s. per annum*; and the sum of 26*l. 12s.* for absent commons for the said 4 years and 3 quarters of a year, at the rate of 5*l. 12s. per annum*.

1815.

Lord
ROSSILYN
v.
JODRELL

[306]

1815.

Lord
ROSSLYN
v.
JODRELL.

Rejoinder, that nothing of the said several sums of money, or any of them, ever grew due or chargeable upon the defendant, for pensions, preachers' duties, commons, absent commons, or vacation commons, *modo & forma, &c.*—and issue thereupon.

[307] The following was the particular of the demand :

	£.	s.	d.
Absent commons, in full from the end of Michaelmas Term 1771 to the end of Michaelmas Term 1774, 3 years after call to the Bar, at 4 <i>l.</i> 16 <i>s.</i> <i>per annum</i>	-	-	14 8 0
Vacation commons, 3 years after call, at 4 <i>l.</i> - 12 0 0	-	-	12 0 0
Preacher, 3 years after call, at 10 <i>s.</i> <i>per annum</i>	-	1	10 0
Pensions, 3 years after call, at 5 <i>s.</i> 4 <i>d.</i> <i>per annum</i>	-	0	16 0
Absent commons in full, from the end of Michaelmas Term 1774 to the end of Trinity Term 1809, being 34 <i>½</i> years, at 4 <i>l.</i> 16 <i>s.</i> - - - 166 16 0	-	-	166 16 0
Preacher, from the end of Michaelmas Term 1774 to the end of Trinity Term 1809, 34 <i>½</i> years, at 10 <i>s.</i> <i>per annum</i>	-	-	17 7 6
Pensions, 34 <i>½</i> , at 5 <i>s.</i> 4 <i>d.</i> <i>per annum</i>	-	-	9 5 4
Absent commons, from the end of Trinity Term 1809 to the end of Trinity Term 1810, one year	5	8	0
Preacher one year	-	-	0 10 0
Pensions, one ditto	-	-	0 5 4
Absent commons, from the end of Trinity Term 1810 to the end of Trinity Term 1815, 5 years, at 5 <i>l.</i> 12 <i>s.</i> <i>per annum</i>	-	-	28 0 0
Preacher, 5 years, at 10 <i>s.</i> <i>per annum</i>	-	-	2 10 0
Pensions, 5 years, at 5 <i>s.</i> 4 <i>d.</i> <i>per annum</i>	-	1	6 8
		£260	2 10

[308] It thus appears, that the demand came under four heads,—1. Absent commons.—2. Vacation commons.—3. Preacher.—4. Pensions. The Absent commons were charged at 4*l.* 16*s.* a year from 1771 to 1809; for one year from that time at 5*l.* 8*s.*, and from 1810 to 1815, at 5*l.* 12*s.* The Vacation

commons were only charged for the first three years after the defendant's call to the bar, amounting in all to 12*l.* The Preacher and Pensions have remained unaltered, the former being 10*s.* *per annum*, and the latter 5*s. 4d.*

1815.

Lord
ROSSIAN
v.
JODRELL.

Mr. *Jodrell* being applied to for payment of these arrears, wrote back in answer, that "it was not his intention to discharge them, since more than twenty years had elapsed from the time when he resolved that he would not yield to the claim of the Society." He had never practised at the bar, nor held chambers in the Inn, nor attended in the Hall from the time of his being called, nor petitioned to become a compounder.

It appeared that he had early expressed dissatisfaction with the manner in which Benchers were elected, and with the management of the affairs of the Society, contending, that for these and other reasons the orders of the Council were illegal and his bond could not be enforced.

The bond being now put in, Mr. *Lane*, the Steward of the Society, was called, and stated the amount of the arrears due from the defendant. He said the Commons are divided into [309] Eating, Absent, and Vacation. The first are charged to those who dine in the Hall, whether Benchers, Barristers, or Students; and the second to the Members of the Society who do not. These have been regularly paid by many, but many have refused to pay them. The present is the first instance of a bond being put in suit to enforce payment of them. The vacation commons are only charged for the first three years after the member of the Society is called to the bar. In point of fact, no commons are now provided in the vacation, or have been for many years past. The charge of 10*s.* a year for the preacher has always been made towards defraying the expence of religious worship, for which purpose the amount of the sum thus collected is very inadequate. There have been immemorially various poor persons, pensioners of the Society, for whose support 5*s. 4d.* a year has been collected in the name of "pensions."

1815.

To prove further that all these duties "were due, and had been imposed upon the defendant by order of and according to the custom of the Society," the following entries were read from the books of the Council :

Lord Rosslyn v. Jodrell.

[1. Absent Commons.]

At a council held 15th *May*, 37 *Eliz.* 1595.

[310] "It is ordered, that every gentleman of this house, admitted "to be an utter barrister, and under the degree of a bencher, "shall be and continue in commons, and give personal attend- "ance in the house by the space of three months, either "together or at several times in every year, to be accompted "from the first day of this Easter Term ; and every gentleman "of this house being under the degree of an utter barrister "shall be and continue in commons, and give personal attend- "ance in this house by the space of four months in every year "to be accompted in like sort as is aforesaid, upon pain to "lose their chambers, that they have or hereafter shall have "within this house. And that for defaught of being in com- "mons or of the attendance aforesaid, it shall be lawful to "any other gentleman of this house to be admitted into the "chambers of any such discontynuer so as is aforesaid failing "in being in commons or in his attendance, unless the gentle- "man so failing in the premises have a special admittance into "his chamber or some other reasonable excuse, to be allowed "by the masters of the bench."

By an order dated the 28th of *November* 1767, 8 *Geo. 3.*

[311] It was ordered, "That for the future every member of the "Society, who should be indebted 10*l.* or upwards for absent "commons, should apply for leave to compound for the same "within twelve months after a bill for such commons should "be delivered to him by the officer of the Society, and in "default of such application within the time aforesaid, that "such member should not afterwards be at liberty to com- "pound for such commons," and this was declared to be a standing order of the Society.

On the 27th of *February* 1768, an order was made, "That "no person should be permitted to compound for absent com-

"mons for three years next after he should be called to the bar, but should be obliged to pay the whole of such absent commons."

1815.

Louis
ROSSIGN
v
JODRILL

On the 20th of *June* 1776, an order was made, "That from and after the then Michaelmas Term, the composition for absent commons should be 12s. for each term, and that each member of the Society should pay their compositions annually, and that unless the same should be paid within three months after the expiration of the said twelve months when the same should become due, that no composition should be admitted for the same, but that they should pay the whole of the said absent commons so in arrear to the Society."

At a council held the 26th of *February* 1778, an order was made, "That the gentlemen who keep commons in the hall, should on and from the first day of Easter Term then next pay for the grand week, and another week in each term, the sum of 17. 4s. instead of 18s., and so in proportion, (that is to say,) 12s. and sixpence for grand week, and 11s. 6d. for any other week, and that the composition for absent commons be from that time one half thereof instead of two third part."

[312]

Finally, by an order of council dated 28th *November*, 50 Geo. 3. the present rate of charge was established as mentioned in the particulars of demand.

[2. Vacation Commons.]

At a council held 4th *November*, 11 Car. I. Whereas gentlemen of this Society, as well of the bar as under indebted for vacations by them forfeited, as their several names, and of the sums by ented to this council, it doth his council, that all such indebted shall at their ge. perils &c. to Mr. Treasuror of this house public notice

1815. "may be taken hereof, a copy of this order is forthwith to be
fixed on the screen in the hall."

Lord
ROSSLYN
v.
JODRELL.

10th November, 11 Car. 1.

[313]

"At this council it is ordered, That the ancient orders
made heretofore for payment of house duties be revived,
continued, and hereafter observed. And the chief butler
is to warn such barristers and other gentlemen of this house,
as are in arrear or behind with payment of forfeitures of any
vacations, to make payment thereof to Mr. Treasurer before
the next council, or otherwise to appear at the next council
and shew cause why they have not paid the same."

29th June, 3 William and Mary, 1691. "Upon the petition of *Edward Horsman*, Esq. barrister of this Society,
shewing that he is in arrear the sum of 12*l.* for vacation
commons, and praying abatement such as shall be reasonable:
It is ordered that paying six pounds before the next
council he be discharged of all vacation commons."

[3. Preacher.]

4 Car. 1.

"At this council Mr. *Edward Reynolds*, late of *Merton College*, in *Oxford*, is chosen to be the preacher of this
house, and is to preach both in terms and vacations, for
which he is allowed fourscore pounds yearly stipend, to be
paid him by equal payments at the end of every term by
the steward of the house for the time being, which is to be
raised by a roll, wherein every bencher and associate to be
taxed at 3*s.*, every barrister at 2*s. 6d.* and every young gentleman
of this Society at 2*s.* a term, and it is expected he
shall leave all other benefices with cure in convenient time
after he is heremunto admitted."

20th June, 7 Geo. 1. 1721.

"Ordered, That all who for the future shall be in arrear to
the preacher's roll a year or upwards, shall be laid before
the council the first council in every Michaelmas Term."

[4. Pensions.]

1815.

LORD
ROSSLYN
".
JODRELL.

" Be it remembered that on the first day of *July*, in the
 " first year of *Edward 4.* It is ordered by the Society, that
 " every fellow of the Society shall pay yearly for his pensions
 " 4*s.*, to wit, for Michaelmas term next coming 12*d.*, and for
 " Hilary Term then next following 12*d.*, and for Easter Term
 " then next following 12*d.*, and for Trinity Term then next
 " following 12*d.* And that in every term the pensioner shall
 " fix a day, before which day every one shall pay his pension
 " for this term, or one of the Society for him, or he shall go
 " out. So that hereafter every pensioner shall answer for all
 " things which shall be in his roll, or he shall send them out
 " as is aforesaid. And that no one who is so ejected from the
 " Society shall be readmitted unless he make fine with the
 " Society, as well according to the quantity of his pension,
 " while he shall have been so out, together with all arrear-
 " ages, as for the trespass and contempt in this behalf."

26th November, 8. *Elizabeth.* " Item, that if any refuse to
 " pay his pensions, it being lawfully demanded, it is further
 " ordered and agreed that he shall then pay double pen-
 " sions."

6th May, 20 *Elizabeth.* " Item, that after the end of the
 " next pensioners' account, every man shall every term pay
 " his pensions, or else his pension of that term to be doubled,
 " and paid accordingly. Item, that some be appointed by the
 " benchers to join with the pensioner, and to take order with
 " every gentleman of the house, for the better payment of the
 " pensions, and to compound with every one for how much,

[315]

and for how long arrearages as shall seem good to them, so
 " that the same persons compounded for forthwith do make
 " their account."

..... proved when the additional sum of
 pensions, the order for that pur-
 pos.....rs from an entry made in
 the 12.....red at the encreased
 rate of 5*s.* 4*d.*

1815.

Lord
ROSSLYN
v.
JODRELL.

Garrow A. G. in support of the action, contended that the defendant was liable on his bond for all sums which had become due, by order of the council, or by the usage of the Society, and that the arrears claimed were proved to have become due by both.

Scarlett, contrà, said he was instructed by his client, first to take his Lordship's opinion upon the legality of the orders made by the council, constituted as it now is. Mr. *Jadrell*, who had given much attention to the subject, found that the benchers, formerly called "the Antients of the House," were actually the senior members of the Society, venerable for their years and their learning; but the benchers have of late [316] years been inexperienced young men, many of them unconnected with the law, who were preferred by political influence. This he considered such a change in the constitution of the council formed by the benchers as to render their orders a nullity, and to dispense even with the payment of the antient dues of the Society, which were now so liable to be abused.

Lord ELLENBOROUGH.—The defendant acceded to the Society as constituted in the year 1771. I will not look farther back to see how it was governed; and he does not pretend that there has been any change in that respect since. He attorned to it then; and I think he is liable by his bond for all sums which have since become due, either by the usage of the Society or by the order of the council.

Garrow A. G. observed, that the Society had had the honour to have the late Mr. *Pitt* and Mr. *Percival* as benchers, and Lord *Sidmouth*, Mr. *Vansittart*, and several other eminent political characters are so now, but they had all been called to the bench on being appointed to the office of Chancellor of the Exchequer, or some other high situation in the law. (a)

(a) By *Order of Council* of 9th Feb. 's the person is capable of being a bencber unless until the halfe of the Society seven years af their rooms one after another. T' the exception of the Attorn.

Scarlett then insisted, that upon the result of the evidence, the verdict must be for the defendant, or at least the damages must be reduced to a very small amount. He chiefly objected to the charge for "vacation commons." When this originated it was perfectly fair and reasonable. The inns of court were universities in which the student lodged, and might be fed at all times of the year. There were commons in vacation as well as in term. Indeed it appears from *Dugdale* that it was chiefly in vacation that the *readings* took place, and that the attendance of the members in the hall was required. If a member was in commons in vacation, it was perfectly fair that he should pay vacation commons. But now that there are no commons in vacation, the consideration for the accustomed payment has failed, and it cannot be enforced. Accordingly, it has been abandoned by all the other Inns of Court. It has not even been insisted upon as legally due by Lincoln's Inn itself. The steward states that many have refused to pay vacation commons, and this is the first instance of a bond being put in suit upon that ground. It is notorious that Sir *Fletcher Norton*, one of the obligees of this bond, as well as the late Lord *Thurlow*, treated the demand with ridicule, and that the defendant with many others under their sanction, about the time he alludes to in his letter, determined to resist it.—"Absent commons" come under the same consideration. The defendant never having been in the hall, since he was called to the bar, the Benchers can have no right to charge him for what he never eat. If he had held chambers in the Inn, they might have insisted on his paying what they required, or they might have seized the chambers as forfeited. A tenant of chambers in an Inn of Court, holds them merely by licence at the will of the Society, and may be deprived of them if he refuses to conform himself to any of their rules. *In consequence* he may be excluded from the Society altogether. *In consequence* for supposed dues arising out of customs or usages of the Society, is no consideration, cannot be recovered. If the Benchers will bring an action to recover the reasonableness of their customs on a case like this, The bond they require were arbitrarily to tax His Majesty ought fit to

1815.

Lord
ROSSIAN
" JODRELL.

[318]

1815. raise the absent commons to 50*l.* a term, according to the argument on the other side this would have been a sum becoming due by an order of the council, and it might have been recovered from every member of the Society.

Lord
ROSSLYN
v.
JODRELL.

The foreman of the jury inquired whether a member of the Society has a power to resign.

Mr. Lane, the steward, said, that by presenting a petition, leave is granted to him on payment of all arrears then due.

[319] *Scarlett.* This shews that the leave may be withheld, and the bond still kept in operation, to enforce future exactions. The reasonableness of these orders must be enquired of by a judge and jury, or it will be found that the bonds of all present, who have entered at Lincoln's Inn, are forfeited, and the most alarming consequences may ensue. It appears by an order made by the council of that Society on the 6th Feb. 7 Jac. I. the object of which seems to have been to prevent that dullness at the bar which has since been so much complained of, "that the under barristers were by decimation put out of commons, for example's sake, because the whole bar were offended by not dancing on the *Candlemas* day preceding, according to the ancient order of this Society, when the judges were present,"—with a threat that if the like fault were committed afterwards, they should be fined or disbarred. [320] (a) It will be for the jury to say, therefore, whether

(a) FORTESCUE, in his treatise *De Laudibus Legum Angliae*, says, that those sent to the Inns of Court, "did there not only study the laws to serve the courts of justice, and profit their country, but did further learn to *dance*."

DUGDALE, in his *Orig. Jur.* gives a very minute account of the dancing before the Judges. After describing the election of the Ancient and Puisne Readers, and the Master of the Revels, and their functions at dinner, he proceeds, "Dinner ended, they wait on the Judges and Serjeants, ushering them into the garden or some other retiring place, where they are cleansed and prepared; and then brought to the hall, and placed them in

they think it reasonable that a gentleman, who has in fact ceased to belong to the Society or the profession for forty years, should be compelled to pay dues as if he had been living in the inn, dining in the hall, attending in the chapel, and practising at the bar during the whole of that time.

1815.

Lord
ROSSLYN
v.
JODRELL

Lord ELLENBOROUGH—I am of opinion, that the defendant is liable on his bond for all the payments demanded of him. They were existing payments when he entered into the Society, and he cannot be heard here to say, that they are unreasonable. I cannot enter into the *rationale* of each ; I make no doubt that they would all be found to be reasonable and proper, and that they are applied to the most laudable purposes ; but that is not now the subject of our inquiry. The defendant by his bond has undertaken, during his life, duly and orderly to discharge all such debts, duties, and charges, as should grow due and chargeable upon him for pensions, preachers' duties, commons, &c. and all other duties whatsoever to be due or imposed upon him by order of, and according to the custom of the Society. Whether these duties be reasonable or not, he must pay them, or his bond is forfeited. *Hac in fidera venit.* There is no pretence for saying there is any illegality in any part of the demand. Is not the expence of performing the offices of religion in the Society to be defrayed, as it is proved to have been for centuries past ?

[321]

Ancient that hath the staff in his hand, stands at the upper end of the bar table; and the other, with the white rod, placeth himself at the cupboard, in the middle of the hall opposite to the Judges, where the music being begun, he calleth twice the Master of the Ceremonies. And at the second call, the Ancient with his white staff in his hand and begins to lead the measures; followed first by the Gentlemen under the bar, all according to their severall dignities; and when one measure is ended, the Ancient calls for another, and so in order. The Reader at the cupboard is walking or dancing forthwith begins with the first line of the song, which all the rest of the company follow him.

1815.

Lord
ROSSLYN
v.
JUDRELL.

Equal formality was observed with respect to *beards*; for in 33 *Henry VIII.* an order was made “that none of the fellows of this house, being in commons or at repast, should wear a *beard*, upon pain to pay double commons or repast during such time as he should have any *beard*.” But this order not being strictly observed, the penalty was made greater in 1 *Mary*, viz. “that such as had *beards*, should pay 12*d.* for every meal they continued them; and every man to be *shaven* upon pain of putting out of commons.”

In 1 *Eliz.* it was further ordered, “that no fellow of this house should wear any beard above a *fortnight's growth*, and that who so transgressed therein shoul^b, for the first offence, forfeit 3*s.* 4*d.*, to be paid and cast with his commons; and for the second 6*s.* 8*d.*, in like manner to be paid and cast with his commons; and the third time to be banished the house.”

Soon after, however, the fashion of wearing beards grew so predominant, that the next year it was agreed, “that orders before that time made, *touching beards*, should be void and repealed.”

[325]
Saturday,
Dec. 23.

ALLEY and Others, Assignees of JAMESON, a Bankrupt, v.
HOTSON.

A. being indebted to
B., on going abroad
leaves a general power of attorney with him, and sends an order to C., to whom he had consigned goods for sale, to remit the proceeds to B. on his account.—C. sells the goods, and remits the proceeds to B.—Afterwards and before the money was received by B., A. commits an act of bankruptcy. Held that B. might apply the proceeds in satisfaction of the debt due to him from A.

ACTION for money had and received by the defendant to the use of the plaintiff, as assignees.

The bankrupt was captain of a ship in the service of the *East India Company*. Being about to sail from this country he left a general power of attorney with the defendant, to whom he was indebted in a considerable sum of money. He carried out with him as an investment to *Calcutta* 3 cases of saffron. Not finding a market for them there, he sent them to *Bombay*, addressed to the house of *Forbes and C.* In his letter of advice to that house, dated 8th *January* 1812, he says, “I leave the disposal of the saffron to you, and when sohl, please remit the proceeds to our mutual friend Mr. *Hotson of London*, on my account.”

Forbes and Co. sold the saffron before Jameson's bankruptcy, and remitted the proceeds to the defendant; but he did not receive them till after the bankruptcy.

1815.

 ALLEY
 v.
 HOTSON.

Marryat for the assignees contended, that the bankruptcy operated as a revocation of the order of 8th *January* 1812. The defendant could have no lien, as he had no possession; and the money before it reached him had become the property of the plaintiffs.

[326]

Lord ELLENBOROUGH.—I am of opinion, that the defendant has a right to detain the money in satisfaction of the debt due to him from the bankrupt. When the order of 8th *January* 1812 was given, the bankrupt had a power to give it, and being coupled with an interest, I think it was not countermanded by his subsequent bankruptcy. The transaction is entirely free from fraud. I consider this a case of mutual credit. If a factor has a lien on goods, he has a right to the price, although received after the bankruptcy. In the same manner, I think this money was subject to the defendant's claim before it could vest in the assignees.

Plaintiff's nonsuited.

Marryat and Scarlett for the plaintiffs.

Tuddy and Selwyn for the defendant.

[Attorneys, *Nind and Pearce.*]

Vide *Olive v. Smith*, 5 *Taunt.* 56.

1816. complete her loading till the 16th of *August*, and was not cleared for the homeward voyage till the 4th of *September*.

BUSK
v.
SPENCE.

It was first objected on the part of the defendant, that the flax had not been dispatched from *St. Petersburgh* in time. The seller engaged that the flax should be dispatched from *St. Petersburgh* not later than the 31st *July*, O. S. (that is, 12th *August* N. S.) either for "*Hull or London*." By *St. Petersburgh* must be understood *Cronstadt*, the loading port, and the words "dispatched for *Hull or Loudon*," shew that it was intended that the ship should have sailed on the homeward voyage on or before the day specified. But in fact she was not cleared till the 4th of *September*.

[331] **GIBBS C. J.** however thought it was enough that the flax had been sent down from *St. Petersburgh*, and put on board the ship at *Cronstadt*, before the time mentioned in the contract.

It then appeared that the plaintiff, who resides in *London*, received advice on the 12th of *September* of the ship by which the flax was coming, and did not communicate this to the defendant who resides at *Hull* till the 20th of the same month. The ship arrived in *October*, when the defendant refused to accept the flax without assigning any particular reason.

It was now contended, that he was discharged from the contract by the lateness of the communication of the ship's name. By the contract, the seller engages as soon as he knows the name of the vessel in which the flax is to be shipped, he will mention it to the buyer. Instead of this, he did not mention it till eight days after.

On the other side, they argued, that the language of the contract must receive a reasonable construction; that the communication had been made time enough for all useful purposes; that no injury had arisen to the defendant from the delay, and that at any rate, the undertaking to mention the name of the ship as soon as it was known could not be held a condition precedent, as it did not go to the whole consideration for the contract on the part of the defendant.

GIBBS C. J.—I am of opinion that this is a condition precedent. If it be not, every thing else to be done by the seller might be plucked from the contract. I likewise think that the condition has not been complied with. The plaintiff had notice of the name of the ship on the 12th, and did not communicate it till the 20th. This was not mentioning the ship's name as soon as he knew it. Whether he did so in time, is a question of law, and I am of opinion that he did not. He must therefore be called.

1815.
BESK
v.
SPENCE.

Nonsuit.

Lens Serjt. and *Campbell* for the plaintiff.

Marshall Serjt. and *J. Parke* for the defendant

[Attorneys, *Thompson* and *Rosser*.]

BARRET v. DUTTON and Another.

[333]
Thursday,
Nov. 30.

ASSUMPSIT on an agreement for a charter-party dated 6th January 1814, for a voyage from *London* to *Heligoland*, whereby "thirty running days were allowed for loading the ship at *London*, and discharging her at *Heligoland*, and 10 days on demurrage at 4*l.* a. day." The declaration alleged that the defendant detained the ship 32 days in loading and discharging her beyond the thirty running days.

Where there is a stipulation in a charter-party, that a certain number of running days shall be allowed for loading the ship, the freighter is liable for her subsequent detention for that purpose, although the loading of her within the specified time was rendered impossible by ice in the river.

The point of fact, she was ready to take in her cargo on the 6th January, on which day some goods were actually taken on board, there were frost immediately after set in, and consequently no loading during which time the river *Thames* was frozen over, so that the ship was rendered impossible, to be loaded until the 17th January, when she had been loaded. On the 17th January the loading was resumed, and was completed on the 20th January, when the ship-house was where she lay; but the loading was suspended on the 21st January, by reason of frost, and remained suspended during her clearances.

1815. then burnt down, and her clearances could not be obtained till the 9th of *March*, on which day she sailed. She was employed four days in discharging at *Heligoland*.—A witness stated that it was the business of the owner to procure the ship's clearances.

[334] The plaintiff claimed demurrage from the 7th of *February*, when the 30 running days expired, to the 9th of *March*, when the ship sailed,—together with the four days employed in unloading her at *Heligoland*; and contended that as she was necessarily detained during all that time, the defendant was answerable, although the detention arose from circumstances over which he had no controul.

The defendant, on the other hand, insisted that the action could not be maintained, as the period during which the river was blocked up by the ice, and that which intervened between the burning down of the Custom-house and the sailing of the ship, were both to be excluded from the thirty running days allowed for loading and discharging her.

GIBBS C. J.—I am of opinion that the frost is no defence. This comes within the principle of *Blight v. Page (a)* in which I was counsel, and in which it was decided, that if a merchant hire a ship to go to a foreign port, and covenant to furnish a lading there, a prohibition by the government of that country to export the intended articles neither dissolves the contract nor excuses a non-performance of it. There was an absolute undertaking by the freighter of this ship to load and discharge her in 30 days; and whether it was or was not possible for him to do so from the state of the weather, is quite immaterial.—But I think the defendant is not liable for detaining the ship at *London* after the 25th of *February*, when the loading was completed. The witness stated that it was the duty of the plaintiff, as owner, to bring his ship into clearances. Therefore, if this became impossible, the defendant

house being burnt down, the detention in the interval must be considered as his and not the defendant's.

1815.

BAILEY

^{n.}

DUNLOP

Verdict accordingly.

Lens Serjt. and *Campbell* for the plaintiff.

Best Serjt. and *Curwood* for the defendant.

[Attorneys, *Swain & Co.* and *Swinford*.]

In *Thompson v. Wagner*, Sittings after Trinity Term 1801, Lord Kenyon likewise ruled that frost, completely blocking up the vessel, was no exemption from the claim for demurrage, -- giving leave to move the court upon the point, but no motion was made. M. S.
Vide *Harman v. Clarke*, ante, 159. *Hill v. Idle*, ante, 327.

ORME v. YOUNG.

[336]
Thursday,
Dec. 7.

DEBT on bond in the penal sum of 22,000*l.*, conditioned for the payment of 14,000*l.*, by instalments.

The defendant pleaded (amongst other things) that he entered into the bond as surety for *William Orme the younger*; that certain of the instalments were paid; and that the plaintiff then, without the privity of the defendant, entered into an agreement with *William Orme the younger*, to give him further time for the payment of the remainder.

The bond being produced had a great number of receipts for different instalments, which quite covered it, and there was annexed to it another piece of paper without any stamp, containing for *not be received in*

Where no
endorsement
of receipt
on a bond
have left no
blank space
for receipts
of subse-
quent pay-
ments to be
written
upon, such
receipts
written on
an un-
stamp
piece of
paper, an-
nexed to
the bond,
may be read
in evidence.

but,

R.

1815.

GIBBS C. J. ruled, that being annexed to the bond when there was no longer room upon that for receipts to be written, it might be read in evidence without any stamp.

ORME
v.
YOUNG.

[337]

The defendant, however, could not substantiate the plea in other respects, and the plaintiff had a verdict.

Vaughan Serjt. and *Comyn* for the plaintiff.

Shepherd S. G. for the defendant.

[Attorneys, *Druce* and *Sudlow*.]

TAYLOR and Others v. CURTIS.

If a merchant ship being attacked by a privateer, resists and beats her off, and afterwards delivers her cargo in safety, neither the damage done to the ship in the engagement, nor the value of the ammunition expended, nor

[338]
the charge of curing the wounded seamen, can be made the subject of general average.

THIS was an action of assumpsit for general average.

The plaintiffs are owners of the ship *Hibernia*, in which the defendants shipped goods to be carried from London to St. Thomas's in the West Indies. In the course of the voyage the ship was attacked by an American privateer. The *Hibernia* resisted, and a severe engagement ensued. The privateer was beat off, and the *Hibernia* delivered her cargo safely to the consignees. She sustained great damage during the engagement in her hull and rigging, which were repaired at a considerable expence to the owners. They also incurred a further expence in providing medical assistance for several of the crew who were wounded in the action. Large quantities of gunpowder and shot were likewise expended upon the occasion, which had formed part of the stores and outfit of the ship.

Lens Serjt. for the plaintiffs. The damage sustained by the plaintiffs from the engagement is clearly a general average to which the defendants must contribute. It was voluntarily suffered for the benefit of all, and ~~in~~ ^{as} means of safety. No just distinction can be drawn between the ~~two~~ ^{parties}

of shot against an enemy, and cutting away a mast or throwing goods overboard in a storm. So the injury from the shot of the enemy is like that which is done by means of the jettison to other parts of the ship or goods saved. The healing of the wounded seamen is within the same principle, and is expressly laid down by foreign writers to be the subject of general average. So the practice at Lloyd's has corresponded with this doctrine.

1815.

TAYLOR
v.
CURTIS.

GIBBS C. J.—I cannot feel that this is a loss entitling the plaintiff's to claim a contribution as for general average. The defence may be ingracious; but according to the rules which prevail in this country, I think the loss must fall entirely upon the ship. I cannot distinguish this from the case of a ship carrying a press of sail to escape from an enemy. That is done voluntarily for the preservation of all; but it has been held that a loss arising from a hazard so incurred is not the subject of general average. I likewise remember a case where a ship ran away from a privateer; and was shot through, and it was held that the owner could not claim a general average from the damage so sustained. The practice of underwriters sometimes to contribute to a loss such as this, cannot weigh much, as it may be accounted for from the honour and liberality of those who contribute, and from the sense they must feel of their own interest. If there is no reward allowed for a gallant resistance, such resistances will not be made, and the whole value of the property must be paid, instead of a gratuity for saving it.

[339]

Verdict for the defendants; and the Court of C. P. approving of the direction of the C. J. at *Nisi Prius*, afterwards discharged a rule to shew cause why there should not be a new trial.

Lens, Copley, Serjts., and F. Pollock for the plaintiff's.

Shepherd S. G. and Bosanquet Serjt. for the defendant.

[Attorneys, *Annesley and Crowder & Co.*]

1815.

GRIGG and Another v. SCOTT.

A licence by
the crown
[340]
“to A. & B.
on behalf
of them-
selves and
other Bri-
tish or neu-
tral mer-
chants, per-
mitting the
vessel *J.* to
sail in bal-
last from
London to
Holland,
notwith-
standing
any thing
contained
in H. M.’s
order in
council of
26th April,
1809,” held
to be insuf-
ficient to
legalize a
policy of
insurance
on the ship
in this voy-
age, on be-
half of the
owner, who
was an alien
enemy.

THIS was an action on a policy of insurance, dated 10th July 1810, on the *Jonge Griet*, at and from *London* to her port of discharge in *Holland*, or on the *Ems*. The interest was alleged in *Hermannus Hermenus*, then an alien enemy. The ship sailed in ballast, and was captured by a privateer.

The defence was, that the voyage was illegal, *England* being then at war with *Holland*, and H. M. having by order in council of 26th April 1809 placed all the ports of *Holland*, as far north as the *Ems*, in a state of blockade.

To meet this, the plaintiff put in a licence by the Secretary of State, granted “to *Read & Mojen* on behalf of themselves and other British or neutral merchants, permitting ‘the vessel *Jonge Griet* to sail in ballast from *London* to *Holland*, notwithstanding any thing contained in His Majesty’s order in council of the 26th April 1809.’” The petition on which the licence was granted, was not produced. The ship had brought over a cargo from *Holland*, which she had delivered in the port of *London*.

It was objected by the defendant, that this licence granted to British or neutral merchants, could not protect an alien enemy;—while the plaintiff contended that it must be taken to have been granted to the ship, to whomsoever she might belong, and that government must be considered to have known the circumstances under which she was in this country. And they relied upon *Hagedorn v. Reid*, 1 M. & S. 567.

[341]

GIBBS C. J.—I think the licence insufficient. It dispenses with the order in council; but does not amount to a remission of the King’s belligerent rights to an alien enemy. The petition not being here, I can only look to the licence itself, to ascertain the intentions of government in granting it. It

is granted "to *Read & Mojen* on behalf of themselves and other British or neutral merchants." If it had permitted a cargo to be taken on board, and this had been proved to belong to British or neutral merchants, it would have protected the ship, though the property of an enemy. That was *Hagedorn v. Reid*. But the licence is only to the ship to return in ballast, and nothing appears to shew that it was meant to legalize the voyage to whomsoever the ship might belong. The petition might disclose such circumstances, but it is not before us. The words in the licence pointed out by Mr. *Spankie*, "notwithstanding any thing contained in His Majesty's order in council of 26th April 1809," are strong to shew that its object was to dispense with that order, and not at all events to remit the belligerent rights of the crown.

1815.

Grieg
v.
Scott.

Nonsuit

Vaughn Serjt. and *Taddy* for the plaintiffs.*Shepherd S. G.* and *Spankie* for the defendant.[Attorneys, *Tomlinsons and Crowder & Co.*]

HOUSTON and Others, Executors of NICHOLSON v. ROBERTSON.

[342]
Friday,
Dec. 9

ACTION by the executors of an underwriter against an insurance broker, for premiums due upon three policies effected by him, and subscribed by the testator. These policies were filled up in the name of the defendant "Wm. *Robertson*" as agent, and they provided for certain returns of premium. The events on which these returns were to take place, did not happen till after the testator's death. The defendant had paid into court the amount of the premiums, deducting the returns, and the question was whether he had a

In an action for premiums of insurance by the executors of an underwriter, against an insurance broker, he cannot set off, or deduct, returns of premium of the testator.
which accrued after the death of

1815. right to deduct them, or set them off against the plaintiffs' demand.

**Houston
v.
Robertson**

Shepherd S. G., for the plaintiffs, insisted that there could be no set-off in this case, as the premiums were due to the testator, and the returns were due from the executors, so that the debts were not mutual and in the same right. Nor was there any ground for claiming a deduction, as the full amount of the premiums was a debt which the testator might have recovered in his lifetime, and the returns were as much a cross demand as if they had arisen out of an entirely different contract.

[343] *Vaughan*, Serjt., and *Taddy contra*, insisted that the set-off ought to be permitted, as the premiums were now due to the plaintiffs as executors, and the returns were due from them in the same capacity. At any rate, the defendant was entitled to the same result by way of deducting the returns from the premiums. In truth, the larger premium, first mentioned in the policy, turned out to be more than the underwriter was entitled to receive. For so much as it exceeded the lowest rate of premium to which the underwriter must ultimately have a right, it might be considered as conditional; and as the event had happened which was to reduce it, the legal effect was the same as if only the lowest rate of premium had been mentioned in the policy.

GIBBS C. J.—I believe there is a case determined upon the principle of deducting the returns from the premium; but that is a principle which I never could understand. The full amount of the premiums was due to the testator, and might have been recovered by him in his life-time. The returns never were due from him, and can only be claimed from the defendants as executors. I therefore do not see how they can either be deducted or set off. The reasons on which the recent decisions with respect to the bankruptcy of the underwriter are founded, apply equally to the present case.

[344] Verdict for the plaintiff, which was fully approved of by the Court in the ensuing term.

Shepherd S. G. and Gaselee for the plaintiffs,

1815.

Vaughan, Serjt. and Taddy for the defendant.

HOUSTON
v.
ROBERTSON

[Attorneys, *Gregsons* and *Tomlinsons*.]

Vide *Baker v. Langhorn*, post.

PARK v. HAMOND.

THIS was an action against an insurance broker for negligence, in not effecting a policy of insurance according to the instructions he received, whereby the plaintiff was prevented from recovering from the underwriters.

The plaintiff being at *Malaga*, on the 20th of *November* 1814, wrote a letter to the defendant, in *London*, in which he says, "I request you will insure 1000*l.* on goods shipped on board the *Pearl*, *Edward Callow* master, from *Gibraltar* to *Dublin*, with or without convoy. Messrs. *Carlins and Co.* insure the vessel, which is in excellent condition; and I hope the premium will be equally moderate, and the subscribers as respectable. I have every reason to expect we shall sail without convoy, having only a few tons of wine for ballast, and the remainder green fruit. I take the risk to myself from this to *Gibraltar Bay*, where I shall send a letter on shore. I hope you will take care there is a return for convoy or safe arrival."

This letter was received by the defendant on the 17th *December*, and the same day he effected a policy for 1000*l.* on goods by the *Pearl* "at and from *Gibraltar* to *Dublin*; with

ance "at and from *Gibraltar*" will attach, if the ship enters *Gibraltar Bay*, although she does not actually touch at the *Garrison*.

Where there are no convoys appointed at the port from which a ship commences her homeward voyage, she is not bound to call for convoy at a port in the course of the voyage from which convoys are appointed.

Where an insurance broker, when instructed to effect a policy on goods, is informed that they were loaded at a prior [345] port to that from which the risk is to commence, he is liable to an action for negligence if he effects the policy in the common form, "beginning the adventure upon the said goods from the loading thereof aboard the said ship."

It seems that a policy of insur-

1815.

PARK
vs.
HAMOND.

" liberty to seek, join, and exchange convoy ; at a premium of six guineas *per cent.* to return two pounds *per cent.* for convoy and arrival." The clause respecting the commencement of the risk on the goods was in the common printed form, without alteration or addition, " beginning the adventure upon the said goods and merchandize from the loading thereof aboard the said ship."

[346] The plaintiff had shipped goods on board the *Pearl* at *Malaga* for *Dublin* to a greater value than the sum insured. She sailed without convoy from *Malaga* about the middle of *November*,

and arrived in the Bay of *Gibraltar* on the 9th of *December*. On account of the plague, she did not touch at that place, but put some letters ashore at *Algeciras*. She then continued her voyage without convoy, and was totally lost on the coast of *Ireland*. Convoys are regularly appointed from *Gibraltar* for the United Kingdom. Two of the underwriters for 200*l.* each paid the loss. A third for the same sum became bankrupt, and the others having been advised by counsel that they were not liable, refused to pay.

Copley Serjt. for the defendant, allowed that the underwriters were not liable; but contended on three grounds, that the plaintiff was not entitled to recover. 1st, The omission to mention in the policy the place where the goods were to be loaded was not such an instance of gross negligence as would sustain the present action. It has only been recently decided, and after much discussion, hesitation, and doubt, that upon a policy like this the underwriters are not liable if the goods turn out not to have been loaded at the port where the risk commences; and it would be too much to require a knowledge of such subtle points of law in an insurance broker. If the plaintiff wished to have the policy differently worded from the common form in this respect, it was his duty to have said so. On the contrary, however, he does not even clearly intimate that the goods to be insured were those he had loaded at *Malaga*. 2dly. But even supposing that the policy had been applicable to goods loaded at *Malaga*, the plaintiff is not damaged, for it never would have attached. The ship was not at *Gibraltar*. Being in the *Bay* was not suffici-

[347]

ent, as she did not touch at the place, and she had no communication with it. 3dly. And if she was at *Gibraltar*, the policy would have been vitiated by her continuing the voyage home without convoy, it being proved that convoys are regularly appointed from *Gibraltar* to the United Kingdom.

1815.

PARK
HAROLD.

GIBBS C. J.—I am of opinion that this action is sustainable. 1st. The instructions were abundantly sufficient to shew that the goods to be insured from *Gibraltar* had been loaded at *Malaga*. It was therefore the duty of the defendant to have stated this fact in the policy. It had been settled both in the King's Bench and Common Pleas, before I left the bar, that a policy on goods “beginning the adventure from the loading thereof aboard the said ship,” without any addition; or “—aboard the said ship as above,” only attaches on goods loaded at the port which is the *terminus à quo* of the risk insured. Insurance brokers are bound to know that this is the law, and to act accordingly for the benefit of their employers. They are expected to display competent skill as well as diligence in their business. 2dly. I conceive the ship was at *Gibraltar* sufficiently for a policy “at and from *Gibraltar*” properly framed to have attached upon her. She was in the *Bay*; and I think I remember cases where ships being insured at and from *Falmouth*, it was held enough for them to join convoy off that port, without having ever entered it. At any rate, here the defendant was instructed to effect a policy from the *Bay of Gibraltar*; and if he had done so, the ship was certainly in a situation to have had the benefit of it. 3dly. Then the convoy act I think would have afforded no exemption to the underwriters, and is therefore no defence to the broker. There were no convoys appointed from *Malaga*; therefore the ship was justified in sailing from thence without convoy; and having thus begun her voyage to *Dublin*, I am of opinion she was not bound to join convoy at any port she passed in the course of the same voyage where convoys are regularly appointed.—However, I think the bankrupt underwriter's subscription should be deducted from the damages as well as the 400*l.* already paid.

[348]

The plaintiff had a verdict for 400*l.*

1815. end. No merchant could know with certainty that he was effectually insured, for the agents whom he has employed, and who have handed him copies of supposed policies in their names, may have employed an intermediate agent, who may owe more to the broker who actually effects the policy than the whole amount of the property insured. But in *Snook v. Davidson and Another*, 2 Campb. 218., where the same claim was set up by insurance brokers under similar circumstances, *Lord Ellenborough* decided against it, saying, "There was no privity between the parties, and that a sub-agent, employed as the defendants were, could not acquire the broker's general lien." So in *Lanyon v. Blanchard*, 2 Campb. 597. where the person who employed the insurance broker to effect the policy, expressly represented that he had authority to indorse the bill of lading of the goods to be insured, "*Lord Ellenborough* was of opinion, that in transactions of this sort, if an agent represents himself to have a power which is not intrusted to him, his principal is not bound by his acts; that the person who gives faith to the representations of the agent must run the risk of their being true or false; and as *Crowdy* (the agent) had no authority to indorse the bill of lading, or to act as proprietor of the tallow, the defendant was only a sub-agent, and could not retain the sum he had received upon the policy, from the person for whose ultimate benefit it was effected." In the present case, if *Clarkson* had said he had authority to pledge the policy, the defendants could not have retained it, and his silence could not place them in a better situation.

Lens Serjt. for the defendants, relied upon *Maans v. Henderson*, 1 East. 335. and *Mann v. Forrester*, 4 Campb. 60.

GIBBS, C. J.—I am of opinion that the action cannot be maintained. I hold that if a policy of insurance is effected by a broker, in ignorance that it does not belong to the persons by whom he is employed, he has a lien upon it for the amount of the balance which they owe him. In this case [353] *Clarkson* has misconducted himself, and is liable for not disclosing that he was a mere agent in the transaction; but the defendants, who had every reason to believe that he was the

WESTWOOD
v.
BELL.

principal, are entitled to hold the policy. If goods are sold by a factor in his own name, the purchaser has a right to set off a debt due from him, in an action by the principal for the price of the goods. The factor may be liable to his employer for holding himself out as the principal; but that is not to prejudice the purchaser, who *bona fide* dealt with him as the owner of the goods, and gave him credit in that capacity. The lien of the policy-broker rests on the same foundation. The only question is, whether he knew or had reason to believe that the person by whom he was employed was only an agent; and the party who seeks to deprive him of his lien must make out the affirmative. The employer is to be taken to be the principal till the contrary is proved. If the plaintiff's assent to the employment of *Clarkson* is denied, then he can have no right to the policy, and there is no privity between the parties. The argument about pledging the policy is fallacious. This never was a policy of the plaintiff's which he held unincumbered and handed over to his agent. In its very origin and creation it was burthened with the lien. It never has been the plaintiff's for an instant but subject to the lien which is now claimed. The rights of the parties do not stand on the same footing as if *Clarkson* had said he had authority to pledge the policy, but as if he had said, "the goods to be insured are mine, the policy is for my benefit alone, and I agree that when it is effected, it shall remain in your hands till the whole of the balance I owe you is satisfied; and on the strength of it you will continue to trust me." If that had passed, can I say that the defendants are to be stript of their rights, on account of a fact of which they had no knowledge, and that they are to deliver up to a stranger the policy which they have effected under a contract that they should hold it as a security for the balance due to them from their employer? Nor do the cases cited on the part of the plaintiff at all contradict the doctrine I am laying down. In *Snook v. Davidson*, the person who employed the defendants to effect the policy, said that it was for a correspondent in the country. In *Lauzon v. Blanchard*, likewise, the defendant must be taken to have had notice that the person who employed him was not the principal. The representation made by *Crougy*, that he had authority to indorse the

1815.

WESTWOOD,
n.
BELL

[354]

1815. bill of lading, was abundantly sufficient to shew that he was only an agent, and I entirely subscribe to what Lord *Ellenborough* is there supposed to have laid down respecting the risk which the defendant run in giving faith to that representation. The subsequent case of *Mann v. Forrester* is quite decisive. The doctrine stands upon authority as well as upon principle. I should have had no difficulty in determining the question, were it entirely new; and I find myself strongly fortified by the opinions of other judges. The plaintiff must be

[355]

^{r.}
WESTWOOD
BELL.

Nonsuited.

Shepherd S. G., Best Serjt., and Littledale for the plaintiff.*Lens, Copley, Serjts., and Campbell* for the defendants.[Attorneys, *Dennetts* and *Holt*.]**BURRA and Others, Assignees, &c. v. CLARKE and Others.**

Where a bankrupt, before his bankruptcy, having purchased goods on credit, has fraudulently resold them for ready money under their value, an action for goods sold and delivered cannot be maintained by his assignees against the purchaser,

INDEBITATUS assumpsit for goods sold and delivered with the usual money counts.

Best Serjt. in opening the plaintiff's case stated, that the bankrupt before and down to the time of his bankruptcy had been in the habit of buying large quantities of goods on credit, and immediately reselling them to the defendants for ready money, allowing a deduction of 20 per cent. from the original invoice price. This mode of dealing it was contended was a fraud upon the body of the creditors, and the present action might be maintained to recover the difference between the sums advanced by the defendants to the bankrupt, and the real value of the goods.

[356]
to recover the difference between the sums paid to the bankrupt, and the value of goods.

GIBBS, C. J.—You cannot make this goods sold and delivered. I must assume that there was a contract between the

bankrupt and the defendants, by which it was agreed that they should deduct 20 *per cent.* upon all the goods which he sold them. There was a long course of dealing between them on these terms, in which he acquiesced. If that contract stands, they have a right to the deduction. But you affirm the contract by bringing an action for goods sold and delivered. As you state it, there was a gross fraud practised, and perhaps the assignees might treat the supposed sale of the goods to the defendants as a nullity. In that case, however, the property would still remain in the assignees, and trover would be their proper remedy. If you prove all the facts you have opened, you cannot recover in this form of action. An agreement to deduct 20 *per cent.* is clearly to be inferred from the course of dealing, and the sale of the goods was under that agreement, if they were sold at all

1815.

BROWN
CLARKE.

Plaintiffs nonsuited.

Best Serjt., Gurney, and Puller for the plaintiffs.*Shepherd S. G. and Lens Serjt.* for the defendants.[Attorneys, *Sweet and Shepherd.*]

FAITH and Another v. PEARSON.

[357]

TRESPASS for seizing plaintiff's ship the *John*, with her cargo, while sailing on a voyage from *Senegal* to *London*.

The defendant pleaded the general issue, and several special pleas of justification, which were found to be immaterial.

The British registered ship the *John* belonging to the plaintiffs, in the year 1814 was engaged in a voyage from *London*

If an English merchantman be seized as prize by the commander of a King's ship, an action at law cannot be maintained against him for doing so, although he

released her without instituting any proceedings against her in the Admiralty Court; and if an action of trespass be brought against him, it is enough for him to plead the general issue, and to shew that he seized the vessel as prize, without pleading or proving that he had *probable*

1815. to *Senegal* and back under a charter-party. Returning home with a cargo of gum and other *African* produce, she was met in lat. 21 N. long. 26 W. by a fleet from *England* to the *West Indies*, under convoy of H. M.'s ship of war the *Benbow*, commanded by Captain *Pearson*, the defendant. The *John*, though *British* built, had been captured by the *Americans*, and remained some time in their service. She still had *American* canvas. This with other circumstances excited the suspicion of Captain *Pearson*, that she was *American*. He accordingly seized her as such, and notwithstanding all that could be done by her master and crew to undeceive him, he insisted upon carrying her along with him to the *West Indies*. There he discovered his mistake, and released her without having instituted any proceedings against her in the court of Admiralty. She then returned to *London*, and delivered her cargo, which had been very much damaged during the detention.

[358]

Shepherd S. G. for the defendant insisted, that the ship being taken as prize, the action could not be maintained, and relied upon *Le Caux v. Eden*, Doug. 570.

Lens Serjt. contra, contended that it lay upon the defendant to prove that there was *probable cause* for the seizure, which would be a question for the jury. If this action could not be maintained, the plaintiffs were without remedy, no proceedings having been instituted to condemn the ship in the court of Admiralty, and the captain of a man of war or a privateer might at any time wantonly seize a *British* merchantman, carry her to a distant part of the world, and then tell her she was at liberty to seek her port of destination.

GIBBS C. J.—I am of opinion that the question of *probable cause* cannot be considered here. The moment it appears that the ship was seized as an enemy, there is an end of this action. Although the defendant had no probable cause for what he did, he is only amenable in the court of Admiralty. I well remember the case of *Le Caux v. Eden* being decided. The decision was approved of at the time, and has been adhered to ever since. The principle there laid down fully applies to the action we are now trying. If the ship is actually

[359]

seized as prize, although she is released by the captor without being libelled in the Admiralty court, the courts of common law have no jurisdiction upon the subject. The inconvenience would be equally great in either case. If trespass lies for seizing the ship, every sailor on board may bring an action for false imprisonment. We are incompetent here to consider whether the captor was excusable for what he did; and if he was not, what compensation he ought to make to the parties injured. I conceive that they are by no means without remedy, and that proceedings may be originated in the Admiralty court on the part of the captured. There the question of prize or not prize will be properly discussed, the existence of probable cause will be proved or negatived, and by a single decree justice will be done to all concerned. That in point of fact this ship was seized as prize there can be no doubt. Every thing shews that Captain *Pearson* took her as an *American*. She had been in the *American* service, and had the appearance of an *American* in her sails and rigging. A prize-master was sent on board, and the mate put into confinement. I therefore think I ought not to suffer the trial to proceed further. I have nothing to do with the special pleas. On the general issue, I am of opinion, that the defendant is not proved to have been guilty of any trespass for which an action at law can be supported.

The plaintiffs were nonsuited; and the Court in the ensuing term refused a rule to shew cause why the nonsuit should not be set aside.

[360]

Lens, Vaughan, Serjts., and Abbott for the plaintiffs.

Shepherd S. G., Best Serjt., and Richardson for the defendant.

[Attorneys, *Allan* and *Egan*.]

1815.

FATH
n.
PEARSON.

1815.

AUSTIN v. DREW.

Policy of insurance against fire on a manufactory : From the negligence of a servant of the assured in not opening a register, smoke and heat from a stove used in the manufactory are forced into a room

[361] and greatly damage goods, without actually burning any, the fire not being greater than it ought to have been had there been free vent for the smoke and heat :— This held not to be a loss within the policy.

THIS was an action on a policy of insurance against fire.

The premises insured were used as a manufactory for sugar baking. The building was divided into seven or eight stories. On the ground floor were pans for boiling the sugar, and a stove to heat them. From the stove a chimney or flue went to the top of the building, and as it passed each floor, there was a register in it with an aperture into the rooms, whereby more or less heat might be introduced at pleasure. The upper floors were used for drying the baked sugars.

One morning the fire being lighted as usual below, the servant whose duty it was to have opened the register in the highest story forgot to do so. The consequence was, that the smoke, sparks, and heat, were completely intercepted in their progress through the flue, and were forced into the room where sugars were drying. The smoke being perceived below, the alarm was given. One or two men were suffocated in attempting to open the register ; but at last it was opened, and the mischief remedied. Had it remained shut much longer, the premises would probably have been burnt down ; but in point of fact there never was more fire than was necessary to carry on the manufacture, and the flame never got beyond the flue. The sugars however were very much damaged by the smoke, and still more by the heat. The loss amounted to several thousand pounds.

The question was, whether this was a loss for which the insurance office was liable.

GIBBS C. J.—I am of opinion that this action is not maintainable. There was no more fire than always exists when the manufacture is going on. Nothing was consumed by fire. The plaintiff's loss arose from the negligent management of their machinery. The sugars were chiefly damaged

by the heat ; and what produced that heat ? Not any fire against which the Company insures, but the fire for heating the pans, which continued all the * time to burn without any excess. The servant forgot to open the register by which the smoke ought to have escaped, and the heat to have been tempered.

1815.

AUSTIN
v.
DREW.
[*362]

Juryman. If my servant by negligence sets my house on fire, and it is burnt down, I expect, my Lord, to be paid by the insurance office.

GIBBS, C. J.—And so you would, Sir ; but then there would be a fire, whereas here there has been none. If there is a fire, it is no answer that it was occasioned by the negligence or misconduct of servants ; but in this case there was no fire except in the stove and the flue, as there ought to have been, and the loss was occasioned by the confinement of heat. Had the fire been brought out of the flue, and any thing had been burnt, the Company would have been liable. But can this be said, where the fire never was at all excessive, and was always confined within its proper limits ? This is not a fire within the meaning of the policy, nor a loss for which the Company undertake. They might as well be sued for the damage done to drawing-room furniture by a smoky chimney.

The jury, with great reluctance, found a verdict for the defendant.

In the ensuing term, a rule to shew cause why there should not be a new trial was refused by the court.

Shepherd S. G., Lens Serjt., and Gaselee for the plaintiff.

[363]

Vaughan and *Copley* Serjts. and *Tindal* for the defendant.

[Attorneys, *Gregson and Shaw.*]

1815.

PEARCE and Others v. COWIE.

A foreign built ship, British owned, was authorized by 43 Geo. 3. c. 153. § 13. to import into Great Britain the articles therein enumerated.

But that statute, which permits the importation into Great Britain in such a ship of "all

[364] sorts of wool," does not extend to cotton.

THIS was an action for a total loss on a policy of insurance, dated 10th September 1814, upon the ship *Rio Moridago* and her cargo, at and from *Amelia Island* to *Liverpool*.

The defence set up was, the illegality of the voyage.

The ship was *Portuguese* built, and owned by the plaintiffs, *British* subjects, resident in *Great Britain*. At *Amelia Island*, a possession belonging to the crown of *Spain*, she took in a cargo of cotton, with which she sailed on the voyage insured.

To shew that the adventure was legal, notwithstanding the Navigation Act, the plaintiffs relied on 43 Geo. 3. c. 153. s. 13., which enacts, "That from and after the passing of this act, "and during the continuance of hostilities, and until six "months after the ratification of a definitive treaty of peace, "it shall be lawful for any person to import into any port or "place in *Great Britain*, all sorts of wool, and to import into "that part of the United Kingdom called *Ireland* all sorts of "barilla, Jesuits' bark, linen yarn, hems, indigo, cochineal, "wool, and cotton wool, from any country or place whatsoever, "in any ship or vessel belonging to any kingdom or state in "amity with His Majesty, his heirs and successors, navigated "by foreign seamen; any law, custom, or usage to the contrary notwithstanding."

Best Serjt. for the defendants, first objected, that this was not a ship within the description mentioned in the act of parliament, as she belonged to *British* subjects, and therefore could not be said to belong to "a state in amity with His Majesty."

GIBBS C. J.—I shall hold that a foreign-built ship, the property of a British subject, belongs to a state in amity with His Majesty, within the meaning of this act of parliament.

Best Serjt. then objected that the act did not extend to legalize the importation of *cotton* into *Great Britain* in such a ship.

1815.

PEARCE
v.
COWIE.

[365]

Shepherd S. G. contrà, insisted that the 43 Geo. 3. c. 153., legalized the importation of cotton in foreign-built ships as well as of animal wool. Such must have been the meaning of the legislature. This may be inferred even from the enumeration of articles to be imported into *Ireland*, for there could be no intention to make any distinction between the two parts of the United Kingdom. The 55 Geo. 3. c. 8. may be considered a legislative exposition of the former statute, and that evidently contemplates the importation of cotton into *Great Britain*, in foreign-built ships to be then legal. But without that, the language employed by 43 Geo. 3. is sufficient. This statute says "it shall be lawful to import into *Great Britain* all sorts of wool" in the manner specified. Cotton is a sort of wool; for it is cotton-wool. It is so denominated in the following part of the same section. The ship in question therefore, being loaded with cotton-wool, was employed in importing a sort of wool into *Great Britain* which she had a right to do. This is the construction which has been uniformly put upon the statute at the Custom-house since the time it was passed.

The gentlemen of the special Jury corroborated this statement, and observed that many cargoes of cotton from *Amelia Island* had been allowed to be imported both into *London* and *Liverpool*, in neutral vessels of European built.

GIBBS C. J.—I feel myself compelled to decide that this adventure was illegal. It is allowed to be so unless it be legalized by the 43d of the King. Now that statute only relaxes the navigation act with respect to the importation into *Great Britain* of "all sorts of wool." I must give these words their ordinary meaning, by which they are certainly confined to animal wool, and cannot comprehend the produce of the cotton plant. The following part of the section appears to me to be decisive; for it permits the importation into *Ireland* of "all sorts of wool, and cotton-wool." If the

[366]

1815.

PEARCE
v.
COWIE.

general word *wool* comprehended cotton-wool there would have been no occasion to have subjoined cotton-wool to the enumeration; and the mention of it in the clause with regard to *Ireland* excludes any presumption that it was to be understood in the regulations respecting *Great Britain*. What reason there might be for making a distinction between the different parts of the United Kingdom, or what might be the secret intentions of the legislature, it is not for me sitting here to consider.

Plaintiff nonsuited. (a)

[367]

Shepherd S. G., Lens Serjt., and Scarlett for the plaintiff.

Best, Serjt. and Richardson for the defendant.

[*Attorneys, Windle and Crowder.*]

(a) This decision was cited in a similar case at the same sittings to Lord *Ellenborough*, who recognized and acted upon it, although the Jury again said that a different construction had been put upon the statute at the Custom-house.

C A S E S

ARGUED AND DECIDED

AT

NISI PRIUS

THE COURT OF KING'S BENCH,

At the Sittings after

Hilary Term,

In the Fifty-sixth Year of GEORGE III. 1816.

ADJOURNED SITTINGS AT WESTMINSTER.

WELEN and Another v. MYERS.

Thursday,
Feb. 15.

REPLEVIN for taking and detaining 8 cows in the plaintiff's barn or cow-house.

Cognizance by the defendant, as bailiff of *William Hancock*, stating, that *E. Evans*, from the 1st May till the 23d June 1815, when he became bankrupt, held the hay grass growing and being on 20 acres of land of the said *William*

the demised premises till the 10th, and ordered them to be milked there; *held* that they thereby became tenants to the lessor; and the cows being removed on the 10th, to avoid a distress for arrears of rent, that he had a right to follow and to distrain them under 11 Geo. 2. c. 19.

Where the assignees of a bankrupt, who was lessee of pasture land, being chosen on the 8th of the month, allowed his cows to remain upon

1816.

WELCH
v.
MYERS.

Hancock, in the parish of *Tottenham*, as tenant thereof to the said *William Hancock*, by virtue of a demise to *E. Evans*, from the 1st of *May* to the 29th of *September*, at the rent of 6*l.* 5*s.* per acre, 70*l.* thereof payable on the 22d of *June*, and the residue on the 29th of *September*; and that the plaintiffs, as assignees of the estate and effects of *E. Evans*, from his bankruptcy until at the time of the fraudulent removal after-mentioned, and until and at the said time when, &c., held and enjoyed the said hay grass as tenants thereof to the said *William Hancock*; and because 70*l.* of the said rent on the said 22d of *June*, and from thence until and at the said time when, &c., was due and in arrear from the said *E. Evans*, to the said *William Hancock*, and because the plaintiffs, after the said sum of 70*l.* of the rent aforesaid so became due and in arrear from the said *E. Evans* to the said *William Hancock*, and whilst they so held and enjoyed the said hay grass as tenants thereof to the said *William Hancock* as aforesaid, and within 30 days next before the said time when, &c., to wit, on the 10th day of *July*, in the year aforesaid, had fraudulently conveyed and carried away off and from the said land the said cattle in the said declaration mentioned, and to prevent the said *William Hancock* from disclaiming the same for the said arrears of rent, and for that purpose had before the said time when, &c., to wit, on the same day and year last aforesaid, driven and put the said cattle into the said barn or cow-house in which, &c., he the said defendant being a person by the said *William Hancock* for that purpose lawfully empowered, well and acknowledges the taking, &c.

[370]

Pleas in bar, 1st, That the plaintiffs, as assignees of the estate and effects of the said *E. Evans*, did not hold and enjoy the said hay grass as tenants thereof to the said *W. Hancock*; and 2dly, That they did not fraudulently and clandestinely convey away and carry off and from the said land the said cattle, &c.

It appeared that the grass was demised in the manner stated in the cognizance, and that *Evans* became bankrupt on the 23d of *June*. The cows were then locked up in one of the

fields, the grass of which was so demised, by the messenger under the commission, who remained in possession of them till *Saturday* the 8th of *July*, when the assignees were chosen. In the evening of that day he delivered up the key to a servant appointed by the assignees, who paid him his wages. The cows were allowed to remain on the premises the whole of the next day, and were twice milked there by order of the assignees. Very early on the *Monday* morning, for the alleged reason that the pasture was bare, they were driven off to a place called *Wheeler's Yard* at *Hoxton*, where being discovered they were distrained for the arrears of rent.

1816.

WELCH
".
MYERS.

Garrow A. G. for the plaintiffs contended that there was here no evidence either of a holding by the assignees, or of a fraudulent removal. They had a right to a reasonable time to determine whether they would take to the demise or not, and being appointed themselves on *Saturday*, and having removed the cattle on the *Monday* morning, they must be considered as having repudiated the bankrupt's interest in the premises. Nor could that act be construed into a fraudulent removal of the cattle. — But

[371]

Lord *ELLENBOROUGH* held that the milking of the cows on the *Sunday*, upon the premises, by order of the assignees, was a sufficient adoption of the demise to make them tenants to *Hancock*; and that it would be for the jury to say whether the removal of the cows the next morning was not to avoid a distress, in which case it would certainly be fraudulent, and give a right to the landlord to distrain wherever he could find them within the 30 days.

The defendant had a verdict, and the arrears of rent and value of the distress were estimated at 70/-.

Garrow A. G. and *Marryat* for the plaintiffs.

Topping and *Lawes* for the defendant.

Vide 11 Geo. 2. c. 19. § 1. Co. Litt. 47. a. *Rex v. Stoke*, 2 T. R. 451. *Rex v. Bampton*, 4 T. R. 348. *Turner v. Richardson*, 7 East, 335. *Wheeler v. Bramah*, 3 Campb. 340.

1816:

Thursday,
Feb. 15.

ADAMTHWAITE v. SYNGE.

To prove an examined copy of an Irish judgment, it is not enough for the witness to say that he examined the copy with a record produced to him in the room over the Four Courts at Dublin, where the records of the superior Irish courts are kept, without seeing whence the record in question was taken, or knowing the person who produced it to be an officer of the court.

DEET upon a judgment of the Court of Exchequer in Ireland. Plea *nul tiel record*, concluding to the country.

A witness was called to prove an examined copy of the judgment. He said that he was taken by an attorney at Dublin to a room over the *Four Courts* there, where he was shewn a parchment roll, with which he compared the copy in question. In this room are deposited the records of all the superior *Irish* courts in different presses marked with the names of the different courts respectively. But the witness did not see from whence the roll produced to him was taken, nor did he know who or what the person was who produced it, nor did he hear any thing said upon the subject when it was produced, or while the examination was going forward. Objection being made that the evidence was insufficient,

Courthope for the plaintiff contended that it must be presumed that the roll produced in this place where the records of the courts are kept was a record of one of them; and that the reading of the copy would shew whether it was a judgment of the Court of Exchequer as alleged in the declaration.

[373]

Lord ELLENBOROUGH.—I cannot look at the "copy till I have evidence that it was examined with a record of the Court of Exchequer in *Ireland*; and no such evidence has been brought forward. The attorney who introduced the witness to the place might have carried the supposed roll along with him in his pocket, having first manufactured it himself. We do not know that it was even produced by a person acting as an officer of the court, or that it was ever stated at the time to be the record of a judgment. To allow this evidence to be sufficient would be establishing a precedent which might lead to very inconvenient and dangerous laxity.

Plaintiff nonsuited.

Courthope for the plaintiff.*Heath* for the defendant.

1816.

Doe d. Waltham and Others v. Miles.

Thursday,
Feb. 15.

EJECTMENT for the upper part of a house in the parish of *St. Giles in the Fields*, occupied by the defendant and his family.

The lessors of the plaintiffs being lessees of the premises, entered into partnership with the defendant as linen-drapers. The partnership deed, which was executed by all the parties, provided, that all the partners should occupy and use the premises during the continuance of the partnership only, subject to the payment of the rent reserved by the lease, and an additional rent of 150*l.* The defendant was thereupon let into possession of the upper part of the house, and the business was carried on below.

Where there is a partnership constituted by deed, a notice that it is dissolv-

[374]
ed, signed by the parties, for the purpose of being inserted in the *Gazette*, is sufficient evidence of the dissolution for all purposes against the parties signing it.

To prove a dissolution of the partnership, there was put in a written notice of the dissolution, dated 29th *September* 1815, and signed by all the parties, for the purpose of being inserted in the *Gazette*, which stated that they had that day dissolved the partnership which had subsisted between them.

Comyn for the defendant objected, that as this partnership was constituted by deed, it could only be dissolved by deed, and that some deed for that purpose, executed by the defendant, must be proved to shew that his right to occupy the premises was determined.

Lord ELLENBOROUGH.—As the defendant says by the notice that the partnership was dissolved, I will presume that it was dissolved with all due solemnity. I do not receive the notice as the instrument of dissolution, but merely as an acknowledgment by the defendant that the partnership had been dissolved.

[375]

Verdict for lessors of plaintiff.

Gurney and Gifford for the lessors of the plaintiff.

Comyn for the defendant.

1816.

*Monday,
Feb. 19.*

GANDELL v. PONTIGNY.

Where a servant is hired by the quarter, if he is discharged by his master without sufficient cause in the middle of a quarter, he may recover the quarter's wages under a count in indebitatus assumpsit for work and labour.

INDEBITATUS assumpsit for work and labour, with the common money counts.

The plaintiff was clerk to the defendant, who is a merchant, at the salary of 200*l.* a year, payable quarterly.

A dispute having arisen between them on the 11th of *August* last, the defendant discharged the plaintiff from his service, and paid him 25*l.* for the half quarter, between the 1st of *July* and the 15th of *August*. The defendant then denied the plaintiff's power to discharge him in the middle of the quarter, and the next day made an offer to do the duties of the situation, which the defendant declined.

[376] *Topping* for the defendant contended that at all events this form of action could not be maintained. The plaintiff had been paid for two days more than the time he had actually been employed in the defendant's service. He had bestowed no work and labour in or about the business of the defendant for which the defendant was indebted to him. Therefore supposing him to be entitled to a further compensation, he ought either to have declared in indebitatus assumpsit for salary due to him, or specially on the contract for discharging him in the middle of the quarter. *Hull v. Heightman*, 2 East, 145. was relied upon as in point.

Lord ELLENBOROUGH.—If the plaintiff was discharged without a sufficient cause, I think this action is maintainable. Having served a part of the quarter and being willing to serve the residue, in contemplation of law he may be considered to have served the whole. The defendant was therefore indebted to him for work and labour in the sum sought to be recovered.

The plaintiff had a verdict for 25*l.* the remaining half quarter's salary.

Garrow A. G. and *Dowling* for the plaintiff.

1816.

Topping and *Lawes* for the defendant.

GANDELL
" PONTIGNY.

Vide *Clark v. Mumford*, 3 Campb. 37.

Lord KING v. CHAMBERS and Another.

[377]
Monday,
Feb. 19.

THIS was an action against the defendants as inhabitants of the hundred of *Ossulston* for the damage done to the plaintiff's house in *Wimpole Street*, on the 7th of *March* last, during the riots respecting the corn bill.

It appeared that a mob gathered before the plaintiff's house, threw brick bats and stones against it, broke the windows, the window frames, and the window shutters, burst open the outer door, broke the pavement of the hall, and a stove there standing, and pulled down the area rails. They then expressed themselves satisfied with what they had done, and went off to the house of another gentleman in the same street supposed to be friendly to the corn-bill. The military did not come up till some time after.

To render the hundred liable on the riot act for partial damage done to a house, the rioters must have begun to demolish it with the intention of actually demolishing it, if not interrupted

Gurney for the defendants objected that this was not a beginning to demolish, as the rioters never appeared to have had any intention actually to demolish the house.

Garrow A. G. contra, denied that any such intention was necessary to render the hundred liable. The mob had begun to demolish by breaking the window frames and shutters, and having burst into the house, breaking the pavement and the stove;—and this was all the act of parliament required.

LORD ELLENBOROUGH.—I should clearly hold there was here a sufficient beginning to pull down, if the rioters had at

[378]

1816. the time entertained the purpose of pulling down the house.
Lord King v. Chambers. But I do not remember a case where the hundred was held liable, the mob having voluntarily retired, satiated after such an inception. There has usually been some interruption from whence an intention of further mischief was to be inferred. It is not every breaking of the windows or doors of a house which will make the hundred answerable. The acts of the mob must indicate a purpose to demolish the house. The question therefore will be whether the mob in this case began to demolish with intent actually to demolish the house. If they did the plaintiff is entitled to recover. On the contrary, if they never intended to do more than to break the windows window-shutters, &c. in the manner described, I think the action cannot be maintained.

The Jury found for the defendants.

Garrow A. G. and Puller for the plaintiff.

Gurney for the defendants.

Vide *Sampson v. Chambers*, ante 221.

[379]
Monday,
Feb. 19.

REX v. HAMLYN.

The question of exemption from toll cannot be tried in an indictment against the turnpike keeper for extortion in taking the toll, unless the ground of exemption was specified to him at the time when the toll was taken.

THIS was an indictment against a turnpike keeper for extortion.

The question meant to be tried was whether the prosecutor's cart, carrying manure from the parish of *Marybone* to his farm at *Acton*, was under certain circumstances exempted from the payment of toll.

It appeared that when the cart came to the turnpike the defendant said to the carman "I must have your money." At the time when the toll was taken.

The carman asked what was his demand. The defendant answered " Threepence ; and you shan't pass till you pay it." The carman then paid him the money, without claiming any exemption, and passed through. The defendant knew him, and the prosecutor's name was on the cart.

1816.

REX
v.
HAMLYN.

Lord ELLENBOROUGH.—This indictment cannot be supported. The general right to demand toll is not denied. The exemption ought therefore to have been notified. Whether it could be insisted upon or not, the defendant is not a delinquent. In receiving the toll he committed no offence for which he is criminally answerable.

Not guilty.

Topping and Alley for the prosecution.

[380]

Scarlett, Gurney, and Barrow for the defendant.

1816.

ADJOURNED SITTINGS AT GUILDHALL.*Friday,
March 1.*

The plaintiff is not entitled to interest in an action on a foreign judgment.

ATKINSON *a.* Lord BRAYBROOKE.

THIS was an action on a judgment of the supreme court of the *Island of Jamaica*; and the only question was whether the plaintiff was entitled to interest.

Lord ELLENBOROUGH.—This judgment constitutes only a simple contract debt. I am of opinion that no interest can be allowed.

Verdict for the principal money mentioned in the judgment according to the exchange with *Jamaica*.

Scarlett and Puller for the plaintiff.

Gaselee for the defendant.

[381]
*Saturday,
March 2.*

GOLDIE *v.* GUNSTON and Others.

If a person against whom a commission of bankrupt is sued out, obtains his discharge out of custody in an action by a Judge's order, on the ground of his bankruptcy, he is afterwards precluded from contesting the validity of the commission in a court of law.

THIS was an action of trover by a bankrupt against his assignees, to try the validity of the commission.

The defendants put in the commission, which was dated 11th *October* 1815, and gave in evidence six orders made by Lord *Ellenborough* on the 11th of *January* 1816, upon the application of the bankrupt, for discharging him out of custody, in six different actions, on the ground of his bankruptcy; and proved, by the Marshal's book, that on the same day he had been discharged out of custody accordingly.

Under these circumstances it was contended, that the defendants were not bound to give further evidence of the bankruptcy, and that the plaintiff was precluded from contesting the validity of the commission of which he had so availed himself.

1816.

GOLDBECK
n.
GUNSTON.

Garrow A. G. contra, insisted that the defendant could not be finally concluded by what he had done, as he might then have acted in ignorance either of the facts or the law of his case; and it would be extremely hard if he should be stript of all his property as a bankrupt, although he was never subject to the bankrupt-laws, nor had committed any act of bankruptcy, and he could not obtain a certificate under this commission which would be any protection to him.

[382]

Lord ELLENBOROUGH.—I think the plaintiff, having taken the benefit of the commission in procuring his discharge under it, is precluded from contesting its validity in a court of law. I conceive he may still apply to the Great Seal to have it superseded; but I cannot hear him say that he has not been lawfully adjudged a bankrupt, after he has declared that he was so lawfully adjudged, and on that ground obtained his discharge from several actions brought against him. The mere surrender to the commission, I think, would not be enough, as that is a compulsory act; but great confusion would be introduced, if, after he has voluntarily claimed a benefit as a bankrupt, he should be allowed to say that all those are wrong doers who have acted under the commission.

Plaintiff nonsuited.

Garrow A. G. and Nolan for the plaintiff.*Scarlett, Tuddy, and F. Pollock* for the defendant.Vide *Ex parte Jones*, 11 Ves. 409. *Mercer v. Wise*, 3 Esp. 219.

1816.

COURT OF COMMON PLEAS.

*Tuesday,
Feb. 20.***HINDLE v. BELL and Another.**

If a person who has been discharged under an insolvent act, which vests his effects in the clerk of the peace until an assignee is appointed, he is permitted by the body of his creditors to continue in possession of the effects which belonged to him before his discharge, no assignee being appointed; these effects, whether mentioned in

[384]
his schedule or not, cannot be taken in execution by a creditor who afterwards obtains judgment against him.

THIS was an action against the Sheriff of *Middlesex* for a false return of *nulla bona* to a writ of *fi. fa.*

In *Michaelmas Term* last, the plaintiff brought an action against a gentleman of the name of *O'Brien*, who pleaded in discharge of his person, that on the 1st of *February 1814*, after the debt was contracted, he had been discharged under an insolvent debtors' act. The plaintiff thereupon took judgment against his effects, and immediately sued out a *fi. fa.* Mr. *O'Brien* was proved to have been then living in a well-furnished house in *Craven-street*, with his name upon the door. The bailiff to whom the warrant was directed entered into the house, seized the furniture, and remained in possession for a fortnight, when he withdrew upon an indemnity procured by Mr. *O'Brien*, who said that the goods belonged to his creditors.

He had in point of fact been discharged by the quarter sessions for the city of *London*, at the time mentioned in his plea. Before going to prison, he had lived in this house in *Craven-street*. Upon his discharge, all his creditors, except the plaintiff, consented to his continuing in possession of his house and effects till some arrangement should be concluded for the liquidation of his debts; and he had done so accordingly. No assignment therefore was ever made. It was proved, however, that at the time of the execution, there were in the house two or three articles of furniture which he had purchased subsequently to his discharge. It likewise appeared, that at that time he had a quantity of plate pawned, which he had afterwards redeemed and brought home.

1816.

HINDLE
v.
BELL.

GIBBS C. J.—As to the goods which belonged to Mr. O'Brien before his discharge, I am of opinion that this action cannot be maintained. These are no longer his. No assignment of his effects having taken place, they remain vested in the clerk of the peace. The plaintiff has here mistaken his remedy. He should have compelled a sale of the goods by procuring an assignment. The produce would then have been rateably distributed among the creditors. He could not take possession of the whole by a *fieri facias* and pay himself 20s. in the pound. Even if there had been a fraud in the discharge, the course would have been to move to set it aside before proceeding upon the judgment. Nor is there any difference between such things belonging to Mr. O'Brien before his discharge that are mentioned or are omitted in the schedule he exhibited. None of these were subject to this execution.—But the after-purchased articles ought clearly to have been sold. I am likewise of opinion, that the defendants are further liable to the amount of the money paid on the redemption of the plate. Though the property in that was vested in the clerk of the peace for the benefit of the creditors, the pawnbroker's interest in it which had been subsequently acquired by Mr. O'Brien I think might have been sold under the execution.

[385]

The plaintiff had a verdict for 4*l.*

Shepherd S. G., Best Serjt., and Espinasse for the plaintiff.

Lens, Onslow Serjts., Bolland, and Spankie for the defendants.

1816.

Saturday,
Feb. 24.

BIRCH and Another v. DEPEYSTER.

Where the plaintiff de-
[386] clares specially in as-
sumpsit for not ac-
counting,— with a count
for money had and re-
ceived, *non
assumpsit*
being pleaded to the whole declaration,
and a set-off to the general count; the plaintiff having proved a balance to be due to him which he might have recovered under either count, the defendant shall not be deprived of the benefit of his set-off, and if he establishes it, he is entitled to a verdict on the whole declaration.

Where the master of a ship was hired for a voy-

[387] age to the East Indies by a writ-

ten agreement, which stipulated that he should receive 120*l.* "in lieu of privilege;" and a question arose whether he was entitled to the freight of goods carried in the cabin, which depended chiefly upon the disputed meaning of the word "*privilege;*" held that what the parties said upon the subject before and at the time, when the agreement was entered into, was admissible in evidence, and that the owner then having told the master he should have the use of the cabin for his own benefit, the latter had a right to retain the cabin freight.

THE first count of the declaration stated that in consideration that the plaintiffs would appoint the defendant master of their ship the *Elizabeth*, for a voyage to *Java* and back, he undertook to render an account to them of all sums of money he should receive or enter into any contract to receive for freight during the said voyage,—assigning a breach for not accounting. The usual money counts followed.

Plea, the general issue to the whole declaration, and to the money counts a set-off.

It appeared that in *April 1814*, before the commencement of the voyage, a written agreement was entered into between the parties, by which it was stipulated, that the defendant should receive 120*l.* "in lieu of privilege and primage," and that he should allow the plaintiffs 21*l.* for every passenger he brought home.

The ship was freighted to one *Williams* at a tonnage freight. It appeared that besides the goods taken on board by his supercargo, the defendant put a small quantity in the hold, the freight of which amounted to 75*l.*, and that he completely filled the ship's cabin with goods, for carrying which he received about 1200*l.* He brought home one passenger. It was allowed that the plaintiffs were entitled to 21*l.* for him, and to the 75*l.* for the goods carried in the hold; and on the other side, that a larger sum was due to the defendant for wages and disbursements.

The first question which arose was, whether this could be set off.

GIBBS C. J.—I am of opinion that the defendant is entitled to the set-off which he claims. The sums which the plaintiffs seek to recover might have been recovered as money had and received to their use. Therefore they shall not deprive the defendant of his set-off by declaring specially, and assigning a breach for not accounting.—This brings it to the question of the cabin freight.

1816.

BREACH
DEPEYSTER

The plaintiffs contended that the master of a ship has no right to the cabin freight without an express agreement for this purpose, or the usage of a particular trade, from which an agreement might be implied; and that at any rate the defendant's claim was taken away in this instance by the express agreement, that he should receive 120*l.* "in lieu of *privilege*," which must refer to any right of this sort which he might otherwise have had.

The case on the other side was, that the word *privilege* in the agreement applied only to the master's claim to tonnage in the hold; that the written agreement was silent respecting the cabin freight: and that the plaintiffs had verbally renounced all claim to it before the commencement of the voyage.

A witness was accordingly called, who had been present at a conversation between the parties before the agreement was entered into, and was asked what one of the plaintiffs then said respecting privilege.

[388]

Lens Serjt. for the plaintiff's objected to the examination, on the ground that it was allowing parol evidence to alter the written contract.

GIBBS C. J.—I am of opinion that the examination is proper. The case turns upon the meaning of the word *privilege*. This is a mercantile term, and I must learn its meaning from mercantile men. Then if indifferent witnesses may be called to explain what is understood by *privilege*, may we not hear the construction put upon the word by the parties themselves before the agreement was entered into?

1816.

**BIRCH v.
DEPHESTER** The witness stated, that he introduced the defendant to the plaintiffs; the defendant then said, "What privilege will you allow me?" One of the plaintiffs answered, "We cannot allow you any privilege; but there is a large cabin, and you may make what you please of it."

GIBBS C. J.—Brother *Lens*, there is no getting over this.

Verdict for the defendant.

[389] *Lens, Best, Serjts. and Campbell* for the plaintiffs.

Shepherd S. G. and Taddy for the defendant.

[Attorneys, *Blunt and Keary*.]

Saturday,
Feb. 21.

LEVY v. COSTERTON.

Where by a charter-party of afreightment the owner of the ship covenants that she shall be furnished with every thing needful and necessary for the voyage, he is bound to furnish her not only with all documents required by

[390] the law of this country, but such as are

required for her immediate admission into the foreign port mentioned in the charter-party; therefore, where by such a charter-party a ship was let to freight for a voyage to *Sardinia* and back, held that the owner was liable for not furnishing her with a bill of health, without which by the law of *Sardinia* she could not be admitted into port before performing quarantine.

THIS was an action of covenant by the freighter against the owner of a ship.

The charter-party (which was for a voyage from *England* to *Sardinia* and back) stipulated that the ship, "being light, staunch, and strong, and well and sufficiently manned, tackled, appareled, and furnished with every thing needful and necessary for such a ship, and for the voyage thereafter mentioned, the master should and would receive and load," &c. The declaration assigned for breach that when the ship proceeded upon the voyage, she was not well and sufficiently furnished with every thing needful and necessary for such a ship and for the said voyage, and that on the contrary thereof she set sail without being furnished with a certain document called a *bill of health*, which said document was then

and there needful and necessary for the said ship for the said voyage,—alleging special damage in the delay thereby occasioned.

1816.

LEVY,

v.

COSTERTON

The defendant, by his pleas, averred performance of the covenant, and denied that the bill of health was needful or necessary.

It appeared that a bill of health is a document not necessary for ships clearing outwards at the custom-house here, nor required by our laws to be taken by ships sailing to the *Mediterranean*, but that bills of health are issued to such ships, and generally carried by them. By the law of *Sardinia*, which has been long known to persons engaged in the *Mediterranean* trade, a bill of health is required from all ships even from *England*, and without one they are obliged to perform quarantine. Upon the arrival of the ship in question at *Cagliari* she was put under quarantine for want of a bill of health, and the voyage was thereby greatly delayed.

Best Serjt. for the defendant contended, that the covenant only extended to such things as were necessary to enable the ship to sail from this country, or which our law required. What else the freighter wished to have for his own convenience, he ought to have provided himself. The voyage was performed without a bill of health, although with some delay.

GIBBS C. J.—The covenant is, that the ship shall be provided with every thing needful and necessary for the voyage. I think a bill of health is a thing within the meaning of that covenant. The defendant allows, that for want of it the voyage was delayed. Now I am of opinion that he was bound to provide the ship with all the documents which owners or captains usually procure, and which were necessary to perform her voyage with reasonable expedition, although they may not be required by the law of this country and the voyage may after some delay be performed without them.

The plaintiff had a verdict.

1816.

Lens and Copley Serjts. and *J. Warren* for the plaintiff.

Levy
v.
Costerton

Best Serjt. and *Puller* for the defendant.

[392]
Saturday,
Feb. 24.

ALDRIDGE v. SIMMONS.

In an action on the case for running down a ship, a pilot, under whose management the defendant's ship was when the accident happened, is rendered a competent witness for the defendant by a release from him, al- though he was hired and paid by the captain.

THIS was an action on the case against the owner of a ship for negligence in navigating her, whereby she ran foul of and injured the plaintiff's barge.

When the accident happened, the ship was sailing down the river *Thames*, under the management of a pilot hired by the master.

The pilot was called as a witness for the defendant, having a release from him.

Best Serjt. objected that he ought to have a release from the captain by whom he was hired, and who was liable over to the owner.

GIBBS C. J. I think a release from the owner is sufficient.

The plaintiff had a verdict.

Best Serjt. and *Curwood* for the plaintiff.

Vaughn Serjt. for the defendant.

1816.

MILN v. PREST.

Saturday,
March 2.

THIS was an action against the defendant as acceptor of a bill of exchange for 361*l.*, dated 10th *August* 1815, drawn by *John Wilson*, payable three months after date to the order of *David Smart*, and indorsed by him to the plaintiff.

The drawer of the bill lived at *Dundee*, and had been in the habit of purchasing corn there, which he consigned to the defendant, a corn-factor in *London*, to be sold on joint account. In the end of *July* the defendant wrote to him to purchase a cargo of oats in this manner, which, from some ambiguity in the language employed, he understood to mean a cargo of wheat. He accordingly purchased a cargo of wheat, of which he advised the defendant on the 5th of *August*, at the same time mentioning that he had drawn one bill, and would draw more upon him on account of it. On the 9th of *August*, the defendant wrote him, severely censuring his conduct, but adding, "on receiving an acknowledgement "from you, that the wheat is bought on your account, we will "pay due honour to any bills you may draw on account of "it." *Wilson* on the 10th had drawn the bill in question in favour of *Smart*, who had sold wheat to him to make up this cargo to the value of 361*l.*, and the same day wrote to advise the defendant that he had done so. On the 14th he wrote in answer to the defendant's letter of the 9th, in which, after reciting the defendant's promise to accept the bills drawn on account of the cargo on having an acknowledgment that it was on *Wilson's* account, he accedes to these terms. The bill was left for acceptance on the 16th of *August*, and called for next day, when the messenger was desired to call again the following day, as proper advice of the bill had not been received. The answer the following day was, "It will not be accepted until the ship with the wheat arrives from *Scotland*." The ship arrived safe in a few days, and the defendant sold the wheat for about 1500*l.*; but he then absolutely refused to accept or pay the bill. *Wilson* soon after failed, being above 1000*l.* in his debt.

A promise to accept a bill of exchange in a letter written before the bill is drawn, can only be taken advantage of as an acceptance by a person to whom the letter was communicated, and who took the bill on the credit of it.

Where the drawee of a bill of exchange, drawn on account of a cargo of wheat consigned to him, said when the bill was presented to him for acceptance, "It will [394] not be accepted until the ship with the wheat arrives," held, that on the arrival of the ship with the wheat, this amounted to an actual acceptance.

1816.

["]MILN
_{v.}
PREST.

It was argued for the plaintiff that the defendant's letter of the 9th was a conditional acceptance, and that the condition was fulfilled by *Wilson's* letter of the 14th; and that at all events the answer on the 18th was a promise to accept on the arrival of the cargo, which became absolute when the cargo arrived, relying on *Pierson v. Dunlop*, Cowp. 571.

[395]

On the other side it was contended, that according to *Johnson v. Collins*, 1 East, 98., the promise in the letter of the 9th could not operate as an acceptance of a non-existing bill; and that the answer given on the 18th still left the defendant the option to accept the bill or to refuse to do so, when the cargo arrived.

GIBBS C. J.—As there is no evidence that the letter of the 9th was communicated to the holder of the bill, I am of opinion that *Johnson v. Collins* is an express authority to shew that it does not operate as an acceptance, the bill not being then drawn; but if the jury are of opinion that the answer given on the 18th, according to the use of language in commercial dealings, imported a promise to accept the bill on the arrival of the cargo, I am of opinion that the cargo having arrived, the defendant is now liable as acceptor.

Verdict for the plaintiff.

Best Serjt. and *Campbell* for the plaintiff.

Vaughan and *Copley* Serjts. for the defendant.

Vide *Wynne v. Raikes*, 5 East, 514.

1816.

BAKER and Others, Assignees of GREGORY, a Bankrupt,
v. LANGHORN and Others.

THIS was an action by the assignees of an under-writer against insurance brokers, to recover a balance of 104*l.* 4*s.* 7*d.* due for premiums.

The existence of this debt was not disputed by the defendants, but they claimed a set-off to a larger amount.

They had effected two policies of insurance on a ship called the *Owthorne* for a merchant of the name of *Mann*. These policies were filled up in their names "as agents," and were subscribed by the bankrupt for 250*l.*

On the 4th of June 1815, the ship was abandoned by her crew, on the supposition that she was about to founder.

Intelligence of this being received in London, the bankrupt, on the 20th of July, signed an adjustment for a total loss, and his name was taken off the policies. The defendants then credited *Mann* with the sum insured, and accepted bills of exchange drawn by him for the amount, which were afterwards paid. On the 26th of August a commission of bankrupt was sued out against *Gregory*, the act of bankruptcy having been committed on the 18th. Between the 2d and 7th of September the defendants applied to the bankrupt to put his name again upon the policies, that *Mann* might prove against his estate. The bankrupt accordingly again wrote his name upon the policies, adding "taken off by mistake." It turned out that the ship had not foundered at the time she was abandoned by her crew. On the 17th of June she was found by an English man of war, with seven feet water in her hold, near the coast of America. A master and four men were put on board of her and she sailed for Halifax, but was never more heard of. The news of her being met with at sea reached England in the beginning of September. The policies always remained in the defendants' hands. When first applied to for

Held that insurance brokers who, without a del credere commission, had effected policies in their own names, in which they were described "as agents," could not in an action for premiums by the assignees of a bankrupt under-writer, who had subscribed these policies, set off a total loss which had happened before the bankruptcy, but which had not been adjusted;

[397]

although the policies had always remained in their hands, and they had actually paid the amount of the loss to their principal.

1816. the balance now demanded by the assignees, they promised payment; but they afterwards insisted on their right to set off the 250*l.* subscribed by the bankrupt upon the *Owthorne.*

**BAKER
v.
LANGHORN**

The defendants' counsel contended that the adjustment on the 20th of *July* was not affected by what had subsequently happened; and that even if the adjustment were done away with, the set-off must be allowed, as the policies were filled up in their own names, the loss had happened before the bankruptcy, and they had paid the amount to their principal. *Koster v. Eason*, 2 M. & S. 112. was cited as expressly in point.

- [398] **GIBBS C. J.**—This case turns entirely upon the adjustment. If it be taken that there was no valid adjustment, I am of opinion that the set-off cannot be allowed. In *Koster v. Eason* the brokers do not appear to have been described "as agents" on the face of those policies which they had effected for others, and they had a *del credere* commission from the assured. Here the brokers are described as agents on the face of the policies, and they had no *del credere* commission. The loss was not due to them, but to *Mann* their principal. Therefore till an adjustment took place there was no debt due to them from the under-writer, and there could be no mutual credit between them. If by an adjustment they stood in the situation of *Mann* to the under-writers, and in the situation of the under-writers to *Mann*, there would from thenceforth be a mutual credit between them and the under-writers, they trusting him for the loss, and he trusting them for the premiums. But I am of opinion that an adjustment alone could thus change the situation of the parties. His Lordship left it to the Jury whether under the circumstances there was a binding adjustment or not.

The jury found a verdict for the plaintiffs.

In the ensuing term the Court of C. P. refused a rule to shew cause why this verdict should not be set aside. They seemed inclined to the opinion that the set-off could not be claimed without an adjustment, and thought that at all events the

brokers were precluded from the set-off by their promise to pay the balance to the assignees.

1816.

 BAKER
 " LANGHORN

Vaughan and Copley, Serjts., and Heath for the plaintiffs.

Shepherd S. G. and Best Serjt., and Campbell for the defendants.

[Attorneys, *Vind and Warne.*]

Prior to this decision, there seemed some difficulty to understand how the question of mutual credit between an under-writer and insurance broker, where the policy is filled up in the name of the latter, and he being allowed to retain it in his hands, on a loss happening has paid the amount of the sums subscribed to his principal, should depend either upon the circumstance of the broker's character appearing on the face of the policy, or upon his having a *del credere* commission. Whether the under-writer does, or does not, know that the broker is only an agent, he trusts him equally for the premium; and the broker, after paying the loss to his principal, trusts the under-writer for the amount—which he has a right to recover in an action in his own name. He must, to be sure, in such an action allege the interest to be in the principal; but he must have done the same, had he himself appeared as principal on the face of the policy. Then, if the *del credere* commission is not entirely *res inter alios acta*; the only way in which it can operate is to prove the authority given by the assured to the broker to settle the loss, and treat with the under-writer as his creditor. But this seems equally well established by the principal receiving payment from the broker, and allowing the policy to remain in his hands. Indeed, after payment by the broker to the principal, the situation of the parties is precisely the same as if there had been a *del credere* commission: the broker alone is concerned in the payment of the money subscribed; and the loss falls upon him if any of the underwriters become insolvent (a). It might have been imagined that this circumstance was more material to the question of mutual credit than the adjustment, which has no effect to transfer the debt from the

[400]

(a) *Edgar v. Bumstead*, 1 Campb. 411. *Jameson v. Swainstone*, 2 Campb. 546. 1

1816. assured to the broker, and after which, in an action against the underwriter, the interest must still be laid in the assured as before.—

BAKER This view of the subject accordingly seems to have been taken by
LANGHORN the Court of K. B. in the recent case of *Parker v. Beasley*, 2 M. & S. 423., where brokers having effected policies of insurance on goods in their own names for their principals, and accepted bills drawn on account of the goods, which were consigned to them, and lost before arrival, it was held that they were entitled to set off this loss in an action by the assignees of an under-writer for premiums, although they had not a commission *del credere*, and the loss was *not* adjusted.

The reason given by the Court of C. P. for refusing the rule to shew cause, greatly shakes the authority of the case of *Bize v. Dickason*, 1 T. R. 285., where the broker had not only promised to pay, but had actually paid the balance of premiums without deducting the loss, and was afterwards allowed to recover the money back in an action against the assignees of the under-writer.

END OF HILARY TERM.

[As the opinions of the Judges in the BERKELEY PEERAGE CASE, which is so much relied upon in *Rex v. Cotton*, ante, vol. iii. 444. and which is certainly the most important decision on the law of evidence which has taken place for many years, have never yet appeared in print, I have thought that I should render an acceptable service to the profession, by subjoining the following note.]

HOUSE OF LORDS.

COMMITTEE OF PRIVILEGES.

ON THE PETITION OF

WILLIAM FITZHARDING BERKELEY,

Claiming as of right to be EARL OF BERKELEY, &c.

Monday, May 13, 1811.

FRDERICK *Augustus Berkeley*, the fifth Earl of *Berkeley*,
died 8th August 1810.

1. Upon the trial of an ejectment respecting Black Acre,

[402]

between A, and B, in which it was necessary for A,

was his reputed father, offered to give in evidence a deposition made by J. S. in a cause in Chancery, instituted by A, against C. D. in order to perpetuate testimony to the alleged fact disputed by C. D. that he was the legitimate son of J. S., in which character he claimed an estate in remainder in White Acre, which was also claimed in remainder by C. D.—B. the defendant in the ejectment, did not claim Black Acre under either A. or C. D. the plaintiff and defendant in the Chancery suit.—Held by the Judges (*Graham* B, dissentient), that according to law, the deposition of J. S. could not be received upon the trial of such ejectment against B. as evidence of declarations of J. S. the alleged father, in matter of pedigree.

2. Upon the trial of an ejectment respecting Long Acre, between E. and F. in which it was necessary for E. to prove that he was the legitimate son of W., the said W. being at that time dead—E. after proving by other evidence that W. was his reputed father, offered to give in evidence an entry in a Bible, in which Bible W. had made such entry in his own hand-writing that E. was his eldest son, born in lawful wedlock from G. the wife of W., on the 1st day of May 1778, and signed by W. himself.—Held by the Judges unanimously that such entry in such Bible (or in any other book, or on any other piece of paper,) could be received to prove that E. is the legitimate son of W. as evidence of the declaration of W. in matter of pedigree.

3. Upon the trial of an ejectment respecting Little Acre between N. and P. in which it was necessary for N. to prove that he was the legitimate son of T., the said T. being at that time dead; N. after proving by other evidence, that T. was his reputed father, offered to give in evidence an entry in a Bible in which Bible T. had made such entry in his own hand-writing, that N. was his eldest son, born in lawful wedlock from J. the wife of T. on the 1st day of May 1778, and signed by T. himself: And it was proved in evidence on the said trial that the said T. had declared "that he T. had made such entry for the express purpose of establishing the legitimacy "and the time of the birth, of his eldest son N., in case the same should be called in question, "in any case or in any cause whatsoever, by any person, after the death of him the said T."—Held by the Judges unanimously that such entry in such Bible, (or in any other book, or on any other piece of paper,) could be received to prove that N. is the legitimate son of T., as evidence of the declaration of T. in matter of pedigree (but with strong circumstances of suspicion on account of its particularity).

1811.

recommendation of Sir *Vicary Gibbs*, then His Majesty's Attorney General, was referred by the Prince Regent to the House of Lords.

BERKELEY
PEERAGE
CASE.

To explain the questions submitted in this case to the Judges, it is only necessary to state that *William Fitzharding Berkeley*, the claimant, was born 26th December 1786, and that he alleged that his father and mother were married in the parish of *Berkeley*, in the county of *Gloucester*, on the 30th of March 1785. They were likewise married in the parish of *St. Mary Lambeth*, on the 16th of May 1796, till which time *Lady Berkeley* did not appear as his Lordship's wife; nor was the claimant till some time after treated as their legitimate son. They had several children after the second marriage. The only question before the Lords respected the legitimacy of the claimant; and that depended entirely upon the reality of the first marriage alleged to have taken place between his parents.

In the year 1799 a bill was filed in the Court of Chancery by the present claimant and three of his brothers, born before the second marriage, to perpetuate the testimony of their legitimacy, on the ground that they were entitled, in remainder in tail after an estate for life, to certain lands then held by their father;—the children born after the second marriage and others entitled in remainder after them being made the defendants. (a)

The *Earl of Berkeley* was one of the witnesses examined on interrogatories for the plaintiffs, and in his deposition he swore positively to the reality of the first marriage and the plaintiff's legitimacy.

The counsel for the claimant, after a large body of other evidence adduced before the Committee of Privileges, now proposed to read this deposition as a declaration by the late *Earl of Berkeley* in matter of pedigree respecting the legitimacy of his son.

[403]

The admissibility of the deposition was opposed by Sir *Vicary Gibbs*, the Attorney General, on the part of the crown, and Sir *Thomas Plomer*, Solicitor General, appointed to watch the interests of the eldest son, born after the marriage in the parish of *Lambeth*.

Thereupon the Judges were summoned, and the following questions were submitted by the House of Lords to their consideration.

(a) See *Lord Dursley v. Fitzhardinge*, 6 Ves. 251.

1. "Upon the trial of an ejectment respecting *Black Acre*, between *A.* and *B.* in which it was necessary for *A.* to prove that he was the legitimate son of *J. S.*—*A.* after proving by other evidence that *J. S.* was his reputed father, offered to give in evidence a deposition made by *J. S.* in a cause in Chancery, instituted by *A.* against *C. D.*, in order to perpetuate testimony to the alleged fact disputed by *C. D.*, that he was the legitimate son of *J. S.*, in which character he claimed an estate in remainder in *White Acre*, which was also claimed in remainder by *C. D.*—*B.* the defendant in the ejectment did not claim *Black Acre* under either *A.* or *C. D.*, the plaintiff and defendant in the Chancery suit.

1811.
BERKELEY
PEERAGE
CASE.

"According to law, could the deposition of *J. S.* be received upon the trial of such ejectment, against *B.* as evidence of declarations of *J. S.* the alleged father in matters of pedigree ?

2. "Upon the trial of an ejectment respecting *Long Acre*, between *E.* and *F.*, in which it was necessary for *E.* to prove that he was the legitimate son of *W.*, the said *W.* being at that time dead,—*E.* after proving by other evidence that *W.* was his reputed father, offered to give in evidence an entry in a Bible, in which Bible *W.* had made such entry in his own hand-writing, that *E.* was his eldest son born in lawful wedlock from *G.* the wife of *W.*, on the 1st day of May 1778, and signed by *W.* himself.

"Could such entry in such Bible be received to prove that *E.* is the legitimate son of *W.*, as evidence of the declaration of *W.* in the matter of pedigree ?

3. "Upon the trial of an ejectment respecting *Little Acre*, between *N.* and *P.*, in which it was necessary for *N.* to prove that he was the legitimate son of *T.*, the said *T.* being at that time dead; *N.* after proving by other evidence that *T.* was his reputed father, offered to give in evidence an entry in a Bible, in which Bible *T.* had made such entry in his own hand writing that *N.* was his eldest son, born in lawful wedlock from *J.* the wife of *T.* on the 1st day of May 1778, and signed by *T.* himself: And it was proved in evidence on the said trial that the said *T.* had declared 'that he had made such entry for the express purpose of establishing the legitimacy, and the time of the birth, of his eldest son *N.*, in case the same should be called in question, in any case or in any cause whatsoever, by any person, after the death of him the said *T.*'

[404]

"Could such entry in such bible be received, to prove that *N.* is
VOL. IV. U

- 1811.** "the legitimate son of *T.*, as evidence of the declaration of *T.* in
"matter of pedigree?

BERKELEY
PEERAGE
CASE.

Upon the first question, the Judges not being unanimous, they delivered their opinions *seriatim*.

BAYLEY J. The opinion which I have formed is that the deposition is not admissible evidence. Your Lordships observe that the party against whom the evidence is offered was a stranger to the suit, and the deposition is offered in evidence, not in its character of deposition, but as a declaration. I lay out of consideration the circumstance stated in the question of its being the deposition of a *reputed* father; because I believe all the Judges are agreed that no objection arises to its admissibility on that ground. The grounds on which it appears to me that the deposition is not receivable in evidence as the declaration of the witness are these: because it was made *post litem motam*, after a controversy raised upon this very point: because *J. S.* the witness who made it was brought forward to speak to the point by a person who had a direct interest in establishing it: because the deposition is upon interrogatories formally put to *J. S.* by an interested party: and because *B.* against whom it is proposed that the depositions should be read, had no opportunity of putting any questions

[405] on his own behalf. In general when evidence is given *viva voce* in courts of justice, the witnesses speak to what they know, and each party has in turn an opportunity of putting such questions as he may think fit for the purpose of drawing forth the whole truth, and of throwing every light upon the subject which the witness is capable of giving. Whoever has attended to the examination, the cross-examination, and the re-examination of witnesses, and has observed what a very different shape their story appears to take in each of these stages, will at once see how extremely dangerous it is to act on the *ex parte* statement of any witness, and still more of a witness brought forward under the influence of a party interested. In this case *A.* whose legitimacy is supposed to be in issue, has put to *J. S.* every question he thought fit; and has therefore obtained from him probably not the whole that *J. S.* knows upon the subject, but all that will benefit *A.*: while *B.*, against whom this deposition is to be read, has had no opportunity of proposing a single question to *J. S.* either to put his veracity to the test, or to bring out any other matter within the knowledge of *J. S.* which would make in his favour. Where a man speaks upon a subject of his own accord, he naturally tells the whole of what he knows; but where he is examined on interrogatories formally administered to him, his answers are naturally confined to the particulars to which he is so interrogated; and

as the examining party generally knows before-hand the scope of the witness's evidence, he has an opportunity of so shaping his questions as that they may elicit every thing in his favour with which the witness is acquainted, and keep back every thing of a contrary tendency. It may be said that a question of legitimacy is an exception to the general rule, and that a father having once affirmed his son to be legitimate, no enquiries *& contraria* can destroy the effect of his testimony. But the father may have views of his own, and a personal interest to serve by establishing the legitimacy of his eldest son. His eldest son may be of an age to cut off an entail, which cannot be done by means of the younger. There may be various other considerations in point of interest to influence the father, which if exhibited by cross-examination might in a great degree impeach, if not completely destroy, the effect of the evidence he has given. So it might turn out on cross-examination that he had made other contrary declarations, perhaps equally solemn as those to which he has been asked; and that his conduct towards his children and towards other persons had been such as to throw an entire discredit on his present asseverations. The learned Judge then made some observations on the case of *Whitelocke v. Baker*, 13 Ves. 511, and *Goodright v. Moss*, Cwp. 591, and concluded by submitting it to their Lordships as his opinion, that the depositions of J. S. as evidence of declarations in matter of pedigree ought not to be received.

WOOD B. The admission of hearsay evidence of the declarations of deceased persons in matters of pedigree is an exception to the general law of evidence; and it has ever been received with a degree of jealousy, because the opposite party has had no opportunity of cross-examining the persons by whom the declarations are supposed to have been made. But declarations to be receivable in evidence, as I have always understood, and as was said in the case of *Whitelocke v. Baker*, must have been the natural effusions of the mind of the party making them, and must have been made on an occasion when his mind stood in an even position, without any temptation to exceed or fall short of the truth. Upon this principle it has been the general rule, as far back as my experience and knowledge go, to reject hearsay evidence of the declarations of deceased persons, not only relative to matters in actual suit, but in dispute and controversy prior to the commencement of judicial proceedings. Though such declarations may in some instances be founded in truth, I have always understood it to be a general rule to reject them because of the possibility, nay probability, that they may have been made to serve one or other of the contending parties. A most arduous task would be imposed upon the Judge who has to determine in the first in-

1811.

BERKELEY
PEERAGE
CASE.

[406]

1811.

BERKELEY
PEERAGE
CASE.

[407]

stance upon the admissibility or non-admissibility of evidence, if he had no fixed rule to go by in such cases; and if he must in each case institute a previous enquiry into all the circumstances which might or might not influence the mind of the party making the declaration after the suit was commenced or the controversy had arisen. To preserve therefore the pure administration of justice, and for the sake of certainty and public convenience, the law has drawn the line which I have mentioned; and in practice the rule is well established, that declarations made upon a subject then in suit, or in controversy or dispute preparatory to it, are not to be received in evidence. For these reasons it is my humble opinion, that the deposition of *J. S.* could not be received on the trial of the ejectment.

GRAHAM B. I have the misfortune to differ upon this question not only with the two learned persons who have preceded, but I am afraid with the rest of my brethren who are to follow me. But the opinion I am about to offer is the conclusion to which my mind has come with perfect satisfaction. Under the circumstances of the case, I think there is no legal objection to receiving this deposition in evidence—not as a deposition—that I am not prepared to say—but as a declaration of the deponent. One ground on which I am induced to doubt the soundness of that rule which has been laid down by my learned Brothers is, that I cannot find it stated in any book of law that ever fell within my reading. If there be a rule that the declaration of a deceased person upon a subject on which evidence of reputation may generally be received, is inadmissible when made subsequent to suit commenced, it is a rule with which in my little experience I have not become acquainted, and which is confined to the breasts of a few peculiarly conversant with the business of *nisi prius*. I must likewise observe that great uncertainty will arise in the application of the rule. We are told that it extends to all declarations after a suit is in contemplation. But how is it to be determined whether the parties did or did not contemplate a suit at any given moment of time? Then if it should be clearly shewn that the party making the declarations could not by possibility know that a suit was commenced or contemplated, surely the declarations are receivable; but if you exclude them when his knowledge of the *lis mota* is made to appear, what a field of enquiry is opened as often as evidence of reputation is tendered to a judge and jury? It seldom happens that an investigation of a pedigree takes place till an action is brought or resolved upon, and it will often be a great hardship to reject what was then said by a member of the family who dies before the trial. Suppose a man is privately married before the *English Ambassador* at *Paris*, where no register

1811.

BERKELEY
PEERAGE
CASE.

is kept, and has a son. On his return to this country he is re-married to satisfy the scruples of his wife; and afterwards has another son. In the progress of twenty or thirty years, when all the witnesses to the marriage except the father are dead, an estate is left to the eldest legitimate son, who enters into possession. The younger son brings an ejectment to recover this. The father hears of such a proceeding with surprize and dismay, makes a solemn declaration of the legitimacy of the eldest son, and dies. I should require strong authority and clear principle for the rule which should exclude his dying declaration at the trial of the ejectment. You may have the natural and voluntary effusions of the mind of the individual after a suit is commenced, although what he then says may be subject to more suspicion. Let the objection therefore go to the credit, not to the competency of the evidence. Do not shut out what may be the truth, and what may be the only mode of arriving at justice. Receive the evidence, and let the jury, under the direction of the Judge, determine to what weight it is entitled. Hear-say evidence is always to be received with caution, and particularly that which may have arisen when men's minds were heated and biased by an existing controversy upon the subject; but instead of laying down a rigid rule which may exclude *bona fide* declarations entitled to implicit credit, confide in the discretion of the Judge, whose duty it is to point out the circumstances which in each particular case ought to influence the conclusion of the jury. Notwithstanding my profound respect for the noble and learned lord who decided the case of *Whitelocke v. Baker*, I certainly do not altogether approve of the accuracy and precision and justice of the rule there laid down. But that noble lord will allow me to say, that if this particular question had been stated to him upon that occasion, his Lordship would have hesitated at least before he would have held that the deposition of the parent, taken under these circumstances, could not be received as a declaration. The case of *Goodright v. Moss* I must consider an authority the other way.—Although this deposition is not the spontaneous effusion of a man's mind, yet perhaps it is entitled to some degree of credit on the very ground that the deponent did not come forward as a volunteer, and that being judicially interrogated, he declared what he knew upon the subject under the sanction of an oath. We must likewise remember that he stood quite indifferent between the parties. As it strikes me, no one has a right to suppose that J. S. did not, in this deposition, give the true history of his marriage and of his family. What ground have we to suppose that there was any bias on his mind, or that he was interested for one of his children more than for another. He was compelled to state what he knew upon the subject, and it seems what

{ 409 }

1811.

BERKELEY
PEBBAGE
CASE.

he then declared must be rejected because he spoke by compulsion under the sanction of an oath, although his voluntary effusion upon the same subject would have been admitted without question. Your Lordships are about to establish a precedent of great importance; and if the rule which has been laid down be adopted, I fear considerable confusion may be introduced into investigations respecting pedigree, and that evidence will often be excluded which would lead to the discovery of truth, and to the due distribution of justice between man and man. It is my humble opinion in this case, that the deposition of *J. S.* ought to be received as declaration, although made after the suit was commenced.

LAWRENCE J. I concur with the Judges who have stated their opinions against the admissibility of the evidence. From the necessity of the thing, the declarations of members of the family, in matters of pedigree, are generally admitted; but the administration of justice would be perverted if such declarations could be admitted which have not a presumption in their favour that they are consistent with truth. Where the relator had no interest to serve, and there is no ground for supposing that his mind stood otherwise than even upon the subject, (which may be fairly inferred before any dispute upon it has arisen,) we may reasonably suppose that he neither stops short, nor goes beyond the limits of truth in his spontaneous declarations respecting his relations and the state of his family. The receiving of these declarations, therefore, though made without the sanction of an oath, and without any opportunity of cross-examination, may not be attended with such mischief as the rejection of such evidence, which in matters of pedigree would often be the rejection of all the evidence that could be offered. But mischievous indeed would be the consequence of receiving an *ex parte* statement of a deceased witness, although upon oath, procured by the party who would take advantage of it, and delivered under that bias which may naturally operate on the mind in the course of a controversy upon the subject. Notwithstanding what is said in *Goodright v. Moss*, I cannot think that *Lord Mansfield* would have held that declarations in matters of pedigree, made after the controversy had arisen, ought to be submitted to the jury. They stand precisely on the same footing as declarations on questions of rights of way, rights of common, and other matters depending upon usage; and although I cannot call to mind the ruling of any particular Judge upon the subject, yet I know that according to my experience of the practice, (an experience of nearly forty years,) whenever a witness has admitted that what he was going to state he had heard after the beginning of a controversy, his testimony has been

1811.

BERKELEY
PEERAGE
CASE.

uniformly rejected. If the danger of fabrication and falsehood be a reason for rejecting such evidence in cases of prescription, that will equally apply in cases of pedigree, where the stake is generally of much greater value. In looking for authorities upon the subject, I have found two cases at Nisi Prius. *Spadwell v. _____*, before Lord C. Baron *Reynolds* at the Spring Assizes at *Exeter* in 1730, and *Hayward v. Firmin*, before Lord *Camden* at the Sittings after Trinity term 1766. In the first of these, the declarations of an aunt, as to which of three brothers came first into the world, made after the dispute had arisen, were rejected; but such as she had made prior to the dispute were received. Therefore in that case the learned Judge took the distinction of before and after litigation commenced. *Hayward v. Firmin* was an issue to try the legitimacy of a child; and the declarations of the mother as to that fact were received in evidence, though made after the commencement of the suit. But it appears that the case determined by Lord C. Baron *Reynolds*, was not at that time brought under the consideration of Lord *Camden*. In *Goodright v. Moss*, the point whether declarations could be received which were made while the dispute was existing was not adverted to, and in considering the authority of that decision, it must not be forgotten that Mr. Baron *Eyre*, who tried the cause, was of opinion, that the answer was not admissible evidence. The authorities being thus balanced, I think the point must be considered as without any decision, and we must resort to principle and the uniform practice which has obtained in questions of prescription. Hardships may arise in rejecting declarations made [411] between the commencement of the suit and the time of the trial; but such hardships are not confined to the case of pedigree. In other cases, if witnesses die before the trial of the cause, the party who relied upon their testimony must sustain the loss. For avoiding uncertainty in judicial proceedings, general rules must be laid down and adhered to, without regard to our feelings or our wishes on particular occasions. Besides, the hardship may generally be avoided by a bill to perpetuate testimony. In the supposed case of the marriage at *Paris*, no difficulty need have arisen; for under a bill to perpetuate testimony, the father might have been examined on behalf of the eldest son, and his deposition as to all the circumstances of the first marriage regularly read against the younger son on the trial of the ejectment. Although the exclusion of declarations made in the course of the controversy may prejudice some individuals, it is better to submit to this inconvenience than expose courts of justice to the frauds which would be practised upon them were a contrary rule to prevail. That this is not an imaginary apprehension, will occur from what happened at the bar of Your

1811.
BERKELEY
PERTRAGE
CASE.

[412]

Lordship's house in the *Douglas* and *Anglesea* causes—in the first of which, fabricated letters were given in evidence before Your Lordships—and in the second, false declarations. Notwithstanding the danger of incurring the penalties of the crime of perjury, there is scarce an assize or sittings in which witnesses are not produced who swear in direct contradiction the one to the other; and it may be feared that persons who have as little regard to truth, may be induced to make false declarations, when they run no risk of punishment in this world, as no use can be made of their evidence till after their death. We know that passion, prejudice, party, and even good-will, tempt many who preserve a fair character with the world to deviate from truth in the laxity of conversation. Can it be presumed that a man stands perfectly indifferent upon an existing dispute respecting his kindred? His declarations *post litem motam*, not merely after the commencement of the law-suit, but after the dispute has arisen, (that is the primary meaning of the word *lis*,) (a) are evidently more likely to mislead the jury than to direct them to a right conclusion, and therefore ought not to be received in evidence. I am likewise of opinion, that no deposition can be received in evidence as a declaration, to prove a fact which it was the object of that deposition to establish. A deposition is the answer of the witness to such interrogatories as it is thought expedient to put to him, to establish certain facts which the plaintiff alleges, and on which his case depends. Consequently, a deposition is considered a partial representation of facts, as to all persons who have no opportunity of bringing out the whole truth by cross-examination; and on that account, all admit that against a stranger it cannot be received in evidence as a deposition. How then shall it be received as a declaration? In that case, the circumstance of its being upon oath cannot be regarded. To consider it a declaration on oath, would be to receive it as a deposition. This would be blowing hot and cold. As a declaration it is still subject to the same vice and infirmity of being an answer to particular questions artfully put, with an interested view by one party behind the back of the other. All the objections on which it is allowed that this document cannot be received as a deposition, apply with at least equal strength to receiving it as a declaration; and I cannot but think that the law of England would be under a just reproach, if a document which must be rejected in one character, might be rendered admissible by the paltry juggle of changing its name.

HEATH J. I concur in opinion with the majority of the Judges.

(a) *Philosophi statem in litiis conterunt.* CIC.

Since the party against whom it is proposed to read this deposition had no opportunity of cross-examining *J. S.*, who must be taken merely to have answered such questions as the plaintiff found it convenient to put to him, I think, that as a declaration it is exposed to every objection to which it was liable as a deposition. Another objection equally strong is, that it was made after the dispute had arisen. In the course of my long experience, in all the circuits I have gone, I never heard till now of such evidence being receivable. When the objection that the declaration was *post litem motam* has been taken, it has been constantly acquiesced in. It is true there is no mention made of this rule in the books of reports, because they note only the decision of doubtful points. They do not notice matter of mere practice, which was never questioned. When the contest has originated, people take part on one side or the other; their minds are in a ferment; and if they were disposed to speak the truth, facts are seen by them through a false medium. The authorities cited are conflicting; therefore Your Lordships will be governed by principle; and upon principle it seems clear to me that the evidence ought to be rejected. Courts of law have endeavoured to avoid any extension of the rule which admits declarations in matter of pedigree; and serious mischief might arise from relaxing it. Great estates have been litigated upon this species of evidence, and perjury with regard to declarations has been most abundant. But it would hold out an invitation to fabricated testimony, if declarations could be received in evidence which have been made when the contest was actually begun.

1811.

BERKELEY
PEERAGE
CASE.

[413]

MACDONALD C. B. I agree in the opinion entertained upon this subject by almost all the learned Judges. The question is of infinite importance. If such evidence is to be adduced to establish legitimacy, it must equally be received to establish illegitimacy; and in my humble judgment, it is of such a nature that it would shake the condition of every man in the kingdom. After a dispute upon the very point has arisen, a witness is brought forward by a party, who of course tries to find out those whose testimony will be most beneficial to him,—who will say most in his favour, and least against him. In the case put by Your Lordships, there was no opportunity given to the party against whom this deposition is to be read to cross-examine the witness. And if he had been cross-examined by the defendant in the equity suit, what does it amount to? The difference is great between what is called a cross-examination in equity, and a cross-examination at law. In equity, the one party knows not the questions put by the other, nor the answers which have been given by the witness. In the course of a trial at law, every witness comes forward in the presence of both parties, and of those who are to

1811.

BERKELEY
PEERAGE
CASE.
[* 414]

decide upon his testimony. He is examined in chief by the party who produces him; he is cross-examined by the opposite party to the same or other topics; and then comes the re-examination to explain what may have been rendered ambiguous,—with an opportunity to * put any questions which may suggest themselves to the minds of the Judge or the Jury. Would you allow a deposition taken in the former mode to be read against a person who was an entire stranger to the proceeding? We know, that when a solicitor, after the dispute has arisen, searches for evidence; if he finds any persons acquainted with facts unfavourable to his client, he abstains from producing them; and we know that witnesses, who are produced, are often influenced by bad motives. Experience has likewise taught us, that a parent speaking of the legitimacy of a child, is not to be heard with undoubting confidence. In one of the cases referred to, a mother was precluded from proving the illegitimacy of her child, having before sworn to his legitimacy; and in *Goodright v. Moss*, the mother swore that her son was illegitimate, the consequence of which was, that she increased her share of the residue of her husband's estate. The authorities upon the subject are balanced, Lord *Camden* being for receiving the evidence, and Lord C. Baron *Reynolds* and Mr. Baron *Eyre* for refusing it. But the practice has constantly been in affirmation of the decision of C. Baron *Reynolds*; and the expediency of this rule has appeared for a great length of time. If it is departed from, I know not what evidence of declarations may not be offered, or how they are to be dealt with. I cannot conceive the common sense of saying, that the same instrument, if you style it a deposition, is to be rejected; but if you style it a declaration, is to be received. Names cannot change things. Therefore I think, that for the attaining of justice in the particular case, and for the general security, the proposed evidence is inadmissible.

[415]

MANSFIELD C. J. By the general rule of law, nothing that is said by any person can be used as evidence between contending parties, unless it is delivered upon oath in the presence of those parties. With two exceptions, this rule is adhered to in all civil cases. Some inconvenience no doubt arises from such rigour. If material witnesses happen to die before the trial, the person whose case they would have established, may fail in the suit. But although all the Bishops on the bench should be ready to swear to what they heard these witnesses declare, and add their own implicit belief of the truth of the declarations, the evidence could not be received. Upon this subject, the laws of other countries are quite different; they admit evidence of hearsay without scruple. There is not an appeal from the neighbouring kingdom of *Scotland* in which you will not find a great deal of hearsay evidence upon every fact brought into dispute.

1811.

BERKELEY
PEERAGE
CASE.

This has struck many persons as a great absurdity and defect in the law of that country. But the different rules which prevail there and with us seem to me to have a reasonable foundation in the different manner in which justice is administered in the two countries. In *Scotland*, and most of the Continental States, the Judges determine upon the facts in dispute as well as upon the law; and they think there is no danger in their listening to evidence of hearsay, because when they come to consider of their judgment on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve. But in *England*, where the Jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds. (a) To the general rule with us, there are two exceptions; first, on the trial of rights of common and other rights claimed by prescription; and secondly, on questions of pedigree. With respect to all these, the declarations of deceased persons, who are supposed to have had a personal knowledge of the facts, and to have stood quite disinterested, are received in evidence. In cases of general rights, which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what has passed in their own time; and to supply the deficiency, the law receives the declarations of persons who are dead. There, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way, or of common, or the like. A declaration with regard to a particular fact, which would support or negative the right, is inadmissible.—In matters of pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted: but here, as the reputation must proceed on particular facts, such as marriages, births, and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded. General rights are naturally talked of in the neighbourhood; and family transactions among the relations of the parties. Therefore, what is thus dropped in conversation upon such subjects, may be presumed to be true. But after a dispute has arisen, the presumption in favour of declarations fails; and to admit them, would lead to the most dangerous consequences. Accordingly, I know no rule better established in practice than this, that such declarations shall be excluded. With respect to questions of prescription, I have known many instances in which the rule has been acted upon. I never heard the contrary contended either as counsel or

[416]

(a) It is observable, that according to the practice of the English Courts, in *affidavits*, which are submitted to the Judges only, hearsay evidence is often admitted and acted upon.

1811. judge. I think the rule is equally applicable to questions of pedigree; and the violation of it here would be still more alarming. There is no difference between the declarations of a father, and those of any other relative; and if the declarations of a father after the suit has begun be receivable, so must the declarations of all related to the parties, whatever their station in society, and whatever their private character. I do not feel that much mischief is likely to arise from such declarations being rejected. This question supposes *J. S.* to be the reputed father; and evidence of reputation must previously be given *aliunde* to render the declaration admissible. If the father is proved to have brought up the party as his legitimate son, this is sufficient evidence of legitimacy till impeached; and indeed it amounts to a daily assertion that the son is legitimate. On principle I think the evidence inadmissible. The weight of authority I think inclines to the same side. In the famous *Douglas Cause* hearsay evidence of all sorts was received, but that cause was tried by the law of *Scotland*, according to which it was receivable. In the *Anglesea Cause* many declarations of deceased persons were given in evidence; but after an attentive examination I cannot find that any of these had been made after the dispute had occurred. I myself took a note at the time of the case before *Lord Camden*, which states that on a question of the legitimacy of the son, the declarations of the mother as to her marriage, made after the commencement of the suit, were received after objection taken and debate had: but not a word appears to have been said of the prior decision of *Lord Chief Baron Reynolds*. Had it been cited, I make no doubt that I should have enriched my store of notes with some account of it. In *Goodright v. Moss*, the objection to the answer that it was *post litem motam* does not seem to have been taken; and upon examination it will be found, that the new trial was granted on the ground, that the general declarations of the father and mother had been rejected. I am not aware of any other authority upon the subject in our law: but the distinction of declarations *ante litem motam*, and *post litem motam*, is clearly taken in a foreign treatise of great learning, entitled *De Probationibus*. (a)

I have now only to notice the observation, that to exclude declarations you must shew that the *lis mota* was known to the person who made them. There is no such rule. The line of distinction is—the origin of the controversy, and not the commencement of the suit. After the controversy has originated, all declarations are

(a) I have not been able to procure a copy of this book.

BEMBLEDY
PEERAGE
CASE.

417]

to be excluded, whether it was or was not known to the witness. If an inquiry were to be instituted in each instance, whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted, and great confusion would be produced. For these reasons I conceive that the deposition now offered in evidence is not admissible.—And I should inform Your Lordships that Mr. Justice Chambre, who attended this case hitherto, is prevented by illness from attending the house to-day; but he authorizes me to say that he perfectly concurs in the opinion now delivered by the majority of the Judges.

1811.]

BERKELEY
PEERAGE
CASE.

MANSFIELD C. J. then proceeded to deliver the unanimous opinion of the Judges on the 2d and 3d questions submitted to them.

Referring to the 2d, he said : I cannot answer this question without adding something to the answer beyond what is in the question : because it supposes that an entry written by a father in a *Bible* would be of more weight than the same written in any other book. Now I know no difference between a father writing any thing respecting his son in a *Bible*, and his writing it in any other book, or on any other piece of paper ; and therefore the answer I would give is, that such a writing by a father in a *Bible*, or in any other book, or upon any other piece of paper, would be a declaration of that father in the understanding of the law, and like other declarations of the father might be admitted in evidence. Were it to appear in Your Lordships' Journals, that the answer was given in the very words of the question, some persons might suppose that the admissibility of the entry depended upon its being written in a *Bible*, and therefore I submit that the answer should be "that such a writing in a *Bible*, or *any other book*, or on *any other piece of paper*, would be admissible in evidence as a declaration of the father in matter of a pedigree." (a)

[418]

The 3d question is the same in effect, with the addition that the father is proved to have declared, that he had made such entry for the express purpose of establishing the legitimacy of his son, and the time of birth, in case the same should be called in question after the father's death. The opinion of the Judges is, that the entry would be receivable in evidence, notwithstanding the professed view with which it was made. Its particularity would be a strong cir-

(a) The answer is so entered in the Journals.

1811.
BERKELEY
PRERAGE
CASE.

circumstance of suspicion; but still it would be receivable, whatever the credit might be to which it would be entitled. Of course I should wish the same addition to be made to this as to the former answer, "a Bible or any other book, or any other piece of paper." (a)

[419]

Lord ELTON, C. Before proposing any thing to the committee arising out of the opinion of the Judges, I will make one or two observations upon the subjects which they have so learnedly and ably discussed. There does seem a hardship in rejecting the declarations of the late *Lord Berkeley* after the dispute had arisen; for there was no way in which the claimant as heir apparent to his titles could have availed himself of his testimony. The bill filed in 1799, applied only to landed estates in which he had a vested interest. He had no such interest in the titles. Where a bill was filed by the next of kin of a lunatic, a demurrer was put in on the ground that the plaintiffs might not be next of kin at the time of the lunatic's death. (b) Had the claimant made the Attorney General a defendant, I apprehend he might have said, the titles may never be the plaintiff's, whether he is legitimate or not, and having no present interest in them, a bill to perpetuate testimony for the purpose of establishing his claim to them, cannot be supported. But Your Lordships must look hardships in the face rather than break down the rules of law. The next of kin of the lunatic might have lost hundreds of thousands of pounds; but the general principle was adhered to, and the demurrer was allowed. Upon the admissibility of this evidence, Judges have held different opinions, and it might appear remarkable that a declaration under no sanction was receivable, and a declaration upon oath was not. I therefore thought it material to ascertain from the highest authority what the law is upon the subject. Accordingly, in the *Banbury Case*, as the depositions under the bill to perpetuate testimony contained many statements with regard to pedigree, a question was put to the Judges, whether if they could not be received as depositions, they could be received as declarations. The Judges thought that at all events the depositions could not be received as declarations, unless the individuals whose declarations were supposed to be incorporated in the depositions were *aliunde* proved to be relations, and that there was no such evidence. I therefore thought it

(a) This addition is likewise made in the Journals, and the qualification is subjoined, "but with strong circumstances of suspicion on account of its particularity."

(b) *Smith v. Attorney General*, before Lord Chancellor Bathurst, assisted by Lord Chief Justice De Grey, and Lord Chief Baron Skinner, 6 Ves. 260.

right that the question should be again put to the Judges in the present case, it being of great importance to * the claimant and to the public. Your Lordships have heard the opinion which the learned Judges have delivered; and I have no difficulty in saying that I agree with that of the majority. In the case alluded to, decided in the Court of Chancery by myself, (on which I ought to place less reliance than any other noble Lord,) conscious of my liability to err and prone to doubt, (an infirmity which I cannot help,) I delivered the sentiments which I believed to be according to law. I have heard nothing since which has convinced me I was wrong. I have attended most anxiously to the distinctions taken by Mr. Baron *Graham*; but on revolving the subject in my mind, I am forced to concur with the opinion so forcibly expressed by Mr. Justice *Lawrence*, that if the writing was not evidence as a deposition, it was not evidence at all. The suit in equity is commenced on the ground, that unless the testimony be so perpetuated that it may be used as a deposition, it must be entirely lost. Being embodied in deposition, are you to say that this same testimony is to be received as declaration, and read in evidence from the deposition? — The previous existence of the dispute would be a sufficient ground to proceed upon. I have known no instance in which declarations *post litem motam* have been received. When it was proposed to read this deposition as a declaration, the Attorney General flatly objected to it. He spoke quite right, as a Western circuiter, of what he had often heard laid down in the West, and never heard doubted. Lord *Thurlow* was most studious to contradict the case of, *Goodright v. Moss*, and he had learned his doctrine in the same school. So had the Chief Justice of the Common Pleas, and I believe Mr. Justice *Heath*, the result of whose experience Your Lordships have just heard. Therefore, although the authorities are at variance, principle and practice unite in rejecting the evidence.—I introduced the *Bible* into the 2d and 3d questions, as the book in which such entries are usually made. If the entry be the ordinary act of a man in the ordinary course of life, without interest or particular motive, this, as the spontaneous effusion of his own mind, may be looked at without suspicion, and received without objection. Such is the contemporaneous entry in a family *Bible*, by a father, of the birth of a child. But a doubt had been entertained upon this point, and it was fit that it should be solemnly decided. I agree to the admissibility of similar entries in other books. There is a great difference between the competency of evidence, and the credit to which it is entitled. His Lordship concluded by moving that counsel be

BERKELEY
PEERAGE
CASE.

[*420]

[421]

1811. informed, that the deposition of Lord *Berkeley* could not in any shape be received.

**BERKELEY
PEERAGE
CASE.**

Lord ELLENBOROUGH. I had conceived some doubts whether this deposition could not be received as a declaration; but the arguments of the learned Judges have convinced me that it is inadmissible. It is only the answer to particular interrogatories, and may be very different from the genuine reputation upon the subject. I agree with the Judges, that an entry made in a Bible does not *therefore* become evidence; but I cannot say it is not greatly strengthened by being found there, that being the ordinary register in families: and I think there are some exceptions to the generality of the statement of the learned Judges, that every declaration of a parent, howsoever made, before any dispute appears to have subsisted, is admissible.

Lord REDESDALE. The circumstance of an entry being in a family Bible, to which all the family have access, gives it that solidity which it would not have, if made in a book which remained in the exclusive possession of the father. Entries in family Bibles have therefore become common evidence of pedigree in this country; and in *America*, where there is no register of births or baptisms, hardly any other is known. With regard to the main question of the admissibility of the deposition as a declaration, one circumstance is in my mind decisive. In cases of *reputation*, the attorney takes down what old witnesses will prove, and it often happens that some of them afterwards die before the trial. But what was taken down from their mouth is never offered in evidence. And why? Because declarations *post litum motam* are not receivable. That I can take upon myself to say was the practice of the Western circuit, which I happened to go for some years; and we apprehended that we were more correct on subjects of evidence than any other.

[422] After some observations from Lord *Grantley* and Lord *Stanhope*, the question was put that the deposition of the Earl of *Berkeley*, offered in evidence on the 3d of *May* last, as a declaration, ought not to be received,—which passed in the affirmative.

On the 28th *June* 1811, the Committee of Privileges resolved, *nemine dissentiente*, that the Claimant had not made good his claim to the titles of *Earl of Berkeley*, *Viscount Dursley*, and *Baron Berkeley*.

Best Serjt. and Romilly for the claimant.

1811.

The Attorney and Solicitor General *contra*.

BERKELEY
PEERAGE
CASE.

Vide *Outram v. Morewood*, 5 T. R. 123. *Doe d. Didsbury v. Thomas*, 14 East, 323. *Morewood v. Wood*, *Id.* 327. n. *Nicholls v. Parker*, *Id.* 331. n. *Clothier v. Chapman*, *Id. ib.* *Ireland v. Powell*, Peak. Ev. 13. *Rex v. Cotton*, 3 Campb. 444.

AN

INDEX

OF THE

PRINCIPAL MATTERS

IN VOL. IV.

ACCEPTANCE.

See BILL OF EXCHANGE, 9, 10, 11.

ACTION.

See ATTORNEY. LINCOLN'S INN.

1. If an English merchantman be seized as prize by the commander of a King's ship, an action at law cannot be maintained against him for doing so, although he released her without instituting any proceedings against her in the Admiralty Court: and if an action of trespass be brought against him, it is enough for him to plead the general issue, and to shew that he seized the vessel as prize, without pleading or proving that he had *probable cause*. *Faith v. Pearson*, 357

2. Goods come to a wharfinger's consigned to A.—B., believing them to be meant for himself, carries them from the wharf, and uses them, before he discovers the mistake: Held that the wharfinger after paying A. the value of the goods, could not maintain an action against B. for money paid, to recover the amount. *Sills v. Laing*, 81

AGENT.

See INSURANCE BROKER. PRINCIPAL AND AGENT. SHIP BROKER.

AGREEMENT.

See USURY.

Where there was a written agreement to sell and assign "the unexpired term of eight years' lease and good will" of a public house: Held that the purchaser could not refuse to perform the agreement on the ground that when it was entered into, there were only seven years and seven months of the term unexpired. *Betworth v. Hassell*, 140

ALIEN ENEMY.

See INSURANCE, 7.

ARREST, MALICIOUS.

1. In an action for a malicious arrest, to shew the former suit determined, it is enough to put in a rule to discontinue on payment of costs, and to prove the costs taxed and paid. *Bristol v. Haywood*, 214

2. In an action for a malicious arrest, an allegation that the plaintiff gave bail to the sheriff for his appearance at the return of the writ, is not supported by evidence that he paid the debt and 10*l.* for costs into the hands of the sheriff; but he may still maintain the action, although he cannot recover for the consequential damage. *Bristow v. Haywood*, 213

ASSIGNEE.

See BANKRUPT.

ASSUMPSIT INDEBITATUS.

See BANKRUPT, 8. SEAMAN'S WAGES.

Where a servant is hired by the quarter, if he is discharged by his master without sufficient cause in the middle of a quarter, he may recover the quarter's wages under a count in indebitatus assumpsit for work and labour. *Gandell v. Pottigny*, 375

ATTORNEY.

An attorney cannot maintain an action for preparing a warrant of attorney, unless a bill has been delivered, pursuant to 2 Geo. 2, c. 23, s. 23. *Saudon v. Bourn*, 68

ATTORNEY, POWER OF.

See PRINCIPAL AND AGENT, 1. EVIDENCE, 8.

AVERAGE, GENERAL.

If a merchant ship being attacked by a privateer, resists and beats her off, and afterwards delivers her cargo in safety, neither the damage done to the ship in the engagement nor the value of the ammunition expended, nor the charge of curing the wounded seamen, can be made the subject of general average. *Taylor v. Curtis*, 337

AWARD.

1. In an action on an award made under a Judge's order,—to prove the order, it is enough to put in an office copy of the rule, making it a rule of court. *Still v. Halford*, 17
2. In such an action, where the submission is to *A.* and *B.*, and such third person as they shall appoint, to satisfy an allegation that *A.* and *B.* appointed *C.*, it is not enough to put in an award executed by all the three, reciting that *A.* and *B.* did appoint *C.*—and to prove that *C.* acted along with them in the arbitration. *Ib.*

BANKRUPT.

1. If a trader leaves England for the purposes of trade, but remains abroad with intent to delay his creditors, he thereby commits an act of bankruptcy, under the words of 1 Ja. 1, c. 15, s. 2. "otherwise absenthinself." *Wyndham v. Patterson*, 286
2. A trader, on being arrested for debt, is sick in bed, and so ill that he cannot be removed to gaol, without endangering his life: He is therefore allowed to remain some time in his own house, and then carried to gaol, where he remains till the expiration of two months from the date of his first arrest. Held that this was a sufficient lying in prison under 21 Jac. 1, c. 19, s. 2, to constitute an act of bankruptcy. *Stephens v. Jackson*, 164
3. An assignment by deed of all the effects of a trader to trustees, for the benefit of his creditors, with a proviso, that it should be void if all the creditors did not execute it, and that in the meantime the acts of the trustees should be good is an act of bankruptcy, although not executed by the trustees or creditors. But a creditor who, without executing, has assented to the deed,

- by approving of acts done under it by the trustees, is estopped from setting it up as an act of bankruptcy, and it will not support a commission sued out by him as petitioning creditor. *Buck v. Gough*, 232. *Hicks v. Burfit*, 234. n.
4. Where the petitioning creditor's debt, set up to support a commission of bankruptcy, is a bill of exchange drawn by the bankrupt and indorsed to the petitioning creditor, evidence must be adduced that it was so indorsed before the suing out of the commission. *Rose v. Poweroff*, 245
5. Q. whether a bill of exchange is a good petitioning creditor's debt against the drawer, before it becomes due, or has been dishonoured by the acceptor? *Ib.*
6. Where the assignees of a bankrupt, who was lessee of pasture land, being chosen on the 8th of the month, allowed his cows to remain upon the demised premises till the 10th, and ordered them to be milked there; held that they thereby became tenants to the lessor; and the cows being removed on the 10th, to avoid a distress for arrears of rent, that he had a right to follow and to distrain them under 41 G. 2. c. 19. *Welch v. Myers*, 368
7. If a person against whom a commission of bankrupt is sued out, obtains his discharge out of custody in an action by a Judge's order, on the ground of his bankruptcy, he is afterwards precluded from contesting the validity of the commission in a court of law. *Goldie v. Gunston*, 381
8. Where a bankrupt, before his bankruptcy, having purchased goods on credit, has fraudulently resold them for ready money under their value, an action for goods sold and delivered cannot be maintained by his assignees against the purchaser, to recover the difference between the sums paid to the bankrupt, and the value of goods, *Burra v. Clarke*, 355
9. In an action against the assignees of a bankrupt, a notice to dispute the bankruptcy served at the same time when the issue is delivered, with notice of trial on the back of it, is not sufficient under 49 G. 3. c. 121. § 10. *Richmond v. Heapy*, 207
10. Where, on the defendant pleading his bankruptcy, issue is joined on the fact whether he had been discharged under a former commission, the plaintiff must shew that the defendant obtained his certificate under that commission either by the regular proof of it, or by secondary evidence, after a notice to produce it; Without such notice, the defendant's affidavit of conformity under the former commission, held insufficient. *Graham v. Grill*, 282
11. In an action by a bankrupt against his assignees to try the validity of the commission, where notice being given only to dispute the act of bankruptcy, the defendants read the two depositions on the file of the proceedings which prove the trading and petitioning creditor's debt, the residue of the proceedings are not to be considered in evidence, and the plaintiff's counsel has no right to inspect them. *Bluck v. Thorne*, 191
- BARON AND FEME.
1. Although a man is conclusively liable for necessaries supplied to a woman while he is living with her as his wife; when they have separated, he is not liable for necessaries supplied to her, on the ground that he has lived with her and represented her as his wife, if he can shew that in point of fact they were not married. *Munro v. DeChement*, 215

2. A woman who has declared herself to be a feme sole, and as such has executed deeds and maintained actions, if herself sued as a feme sole, is not estopped from setting up the defence of coverture. *Davenport v. Nelson*, 26
3. Where an action is brought by the orders of a wife in the name of her husband to recover a sum of money taken from her on the ground that it was the produce of goods she had been concerned in stealing,—what she afterwards said in her husband's absence respecting the money, when examined on the charge of being concerned in the robbery, is evidence for the defendant. *Carey v. Adkins*, 92
4. In such an action, facts being proved to raise a reasonable suspicion that the money taken from the wife was the produce of stolen property, held that evidence was necessary on the part of the plaintiff to shew whence the money was derived, and that the wife was *bond fide* in possession of it for her husband. *Ib.*
5. If husband and wife live separate, and he pays her an adequate allowance for her support, he is not liable to be sued for her debts, although the separation be not by deed, and there be no written agreement between them with respect to the allowance. *Hodgkinson v. Fletcher*, 70
6. The adequacy of the allowance is a question of fact for the jury. *Ib.*
7. In an action against a husband for necessaries supplied to his wife, where the defence is a separate maintenance, the wife's receipts are no evidence to prove that the allowance has been paid. *Ib.*

BENEFIT SOCIETY.

An action cannot be maintained by the trustees of a benefit society

elected under new regulations agreed to by the members, unless these regulations have been confirmed by the quarter sessions, although the original rules of the society were enrolled, in pursuance of 33 G. 3. c. 54. *Battey v. Townrow*, 5

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. If a place of payment is mentioned in the margin, or at the foot of a promissory note, this is no part of the contract, but a mere memorandum; and in an action on the note, there is no occasion to prove that it was presented there for payment. *Price v. Mitchell*, 200
2. An instrument which appears on common observation to be a bill of exchange may be treated as such, although words be introduced into it for the purpose of deception, which might make it a promissory note. *Allan v. Mawson*, 115
3. An instrument purporting on the face of it to be a promissory note payable absolutely for the price of goods, but having an indorsement upon it, stating, that it was given on condition that if any dispute arose about a sale of the goods it should be void, is not a negotiable promissory note. *Hartley v. Wilkinson*, 127
4. Upon a conviction before magistrates for a breach of the excise laws, a warrant to levy the penalties is directed to an excise officer, who, by way of indulgence to the party, takes from him a promissory note at two months for the amount, without previous authority from his superiors: Held that the promissory note so given was a valid security. *Sugars v. Brinkworth*, 46
5. A stipulation indorsed on a promissory note by the payee is not to be taken as part of that instrument

- without evidence that it was written at the time when the note was made. *Stone v. Metcalfe*, 217
6. If, after a bill of exchange is delivered by the drawer to the payee, its date is altered by an agreement between the payee and the drawee before acceptance, it is void as against all the parties. *Walton v. Hastings*, 223
7. The alteration of a bill of exchange by the drawee after it has been drawn and indorsed, and before it is accepted, postponing the time of payment, renders the bill void. *Outhwaite v. Luntly*, 179
8. Where *A.*, being member of a partnership consisting of several individuals, drew a bill of exchange in blank in the partnership firm, payable to their order; and having likewise indorsed it in the partnership firm, delivered it to a clerk to be filled up for the use of the partnership, as the exigencies of business might require, according to a course of dealing in other instances; and after *A.*'s death, and the surviving partners had assumed a new firm, the clerk filled up the bill, inserting a date prior to *A.*'s death, and sent it into circulation: held, that the surviving partners were liable as drawers of the bill to a *bond fide* indorsee for value, although no part of the value came to their hands. *Usher v. Dauncey*, 97
9. In an action against the acceptor of a bill of exchange payable after sight, if the defendant's signature as acceptor is proved, the date of the acceptance appearing over it, although in a different handwriting, will be presumed to have been written by his authority. *Glossop v. Jacob*, 227
10. A promise to accept a bill of exchange in a letter written before the bill is drawn, can only be taken advantage of as an acceptance by a person to whom the letter was communicated, and who took the bill on the credit of it. *Miln v. Prest*, 393
11. Where the drawee of a bill of exchange, drawn on account of a cargo of wheat consigned to him, said when the bill was presented to him for acceptance, "It will not be accepted until the ship with the wheat arrives," held, that on the arrival of the ship with the wheat, this amounted to an actual acceptance. *Ib.*
12. In an action by the indorsee against the drawer of a bill of exchange, it is sufficient to prove that the defendant had notice of the dishonour of the bill from the acceptor. *Rosher v. Kieran*, 87
13. To prove that a bill of exchange, purporting to be drawn abroad, was in point of fact drawn in *England*, and is therefore void for want of a stamp, it is not sufficient barely to shew that the drawer was in *England* at the time the bill bears date. *Abraham v. Du Bois*, 269
14. The drawer of a bill of exchange a few days before it becomes due, states to the holder that he has no regular residence, and that he will call and see if the bill is paid by the acceptor—Held, that under these circumstances he was not entitled to notice of its dishonour. *Phipson v. Kneller*, 285
15. A promise to pay a foreign bill of exchange made after it is due, is evidence to support the allegations in the declaration of a due presentation for payment, of a protest, and of regular notice to the defendant. *Greenway v. Hindley*, 52
16. *B.* being liable to *A.* upon a bill of exchange, accepted by him for the accommodation of *C.* promises *A.* to indorse another bill in lieu of this, which was to be drawn by *D.* upon *E.* and delivered by *C.* to *A.*—*C.* delivers *A.* a bill drawn by

D, upon E, and purporting to be indorsed by B., and A. delivers up the former bill.—In an action at the suit of A. against B. on the substituted bill, the latter is not precluded from shewing that the indorsement is a forgery. *Moxon v. Pulling,* 50

BILL OF LADING.

See FREIGHT. STOPPING IN TRANSITU.

BOND.

See EVIDENCE, 10. LINCOLN'S INN.

BRIDGE.

A bar across a public bridge kept locked except in times of flood, is conclusive evidence that the public have only a limited right to use the bridge at such times; and if an indictment for not keeping it in repair, states that it is used by the King's subjects, "at their free will and pleasure," the variance is fatal. *Rex v. Marquis of Buckingham,* 189

BROKER.

See INSURANCE BROKER. SHIP BROKER.

CARRIER.

The usual notice given by carriers exempts them from their liability for the loss of goods above the value of 5*l.*, unless the appearance of the goods necessarily indicates that they are above that value. *Down v. Fromont,* 40

CASE.

See PLEADING, 3.

CERTIFICATE.

See BANKRUPT, 10.

CHARTER-PARTY.

See SHIP.

CONVOY ACT.

See INSURANCE, 20, 21, 23, 24.

COPYRIGHT.

1. The assignment of copyright under 8 Ann. c. 19. must be in writing. *Power v. Walker.* 8
2. A parol agreement between the proprietor of the copyright of a work and another person, that the latter for a valuable consideration shall have the exclusive publication and sale of it in *England* does not entitle him to maintain an action for pirating the work. *Ib.*

COVENANT.

See SHIP.

1. Covenant in a lease to insure and keep insured a specified sum of money upon the premises. The lessee effects such an insurance, the policy containing a memorandum, that in case of the death of the assured, the policy might be continued to his personal representative, provided an indorsement to that effect was made upon it within three months after his death. The lessee dies. An indorsement continuing the policy to his personal representative was made after the expiration of three months from the time of his decease.—Held that under these circumstances there was no breach of the covenant to keep the premises insured. *Doe v. Laming,* 73

2. Letting lodgings is not a breach of a covenant in a lease not to underlet any part of the premises without the licence of the lessor. *Doe v. Laming,* 77

COVERTURE.

See BARON AND FEME.

DAY; FRACTION OF.

Where goods are seized under a *f. fa.* the same day that the party commits an act of bankruptcy, it is open to enquire at what time of the day the goods were seized, and the act of bankruptcy was committed; and the validity of the execution depends upon the priority. *Sadler v. Leigh*, 197

DEDICATION OF WAY.

See Way.

DEMURRAGE.

1. Where there is a stipulation in a charter-party, that a certain number of running days shall be allowed for loading the ship, the freighter is liable for her subsequent detention for that purpose, although the loading of her within the specified time was rendered impossible by ice in the river where she lay; but after her loading is completed, he is not liable for any delay that may arise in discharging her, occasioned by the accidental impossibility of obtaining her clearances. *Barrett v. Dutton*, 333

2. It is no defence to an action for demurrage, that the delay in unloading the ship arose from the act of custom-house officers, in unlawfully seizing a part of the cargo. *Bessey v. Evans*, 131

3. The consignee of a particular parcel of goods by a general ship, is liable to the owner for not taking them from the ship in a reasonable time, although the delay arose from the necessity for an order from the Treasury to land these goods, which the consignee used the utmost diligence to obtain. *Hill v. Idle*, 327

4. Where a bill of lading of goods by a general ship deliverable to order, contains a stipulation that the goods are to be taken out in a certain number of days after arrival, or to

pay demurrage, the indorsee of the bill of lading who takes out the goods is liable for demurrage, from the expiration of the lay days calculated from the arrival of the ship, without receiving any notice of that event. *Harman v. Clarke*, 159

5. Where there is such a bill of lading, if there be any inaccuracy in the entry of the ship's name at the custom-house, whereby the owner of the goods, notwithstanding proper inquiries for that purpose, was deprived of the usual means of being informed of the ship's arrival, demurrage cannot be recovered. *Ib.*
6. Although by the bill of lading the goods are deliverable to merchants in London, whose residence is well known, no notice to them of the ship's arrival is necessary to render them liable for demurrage. *Harman v. Mant*, 161

DISTRESS.

See BANKRUPT, 6. PLEADING, 1.

DOG.

In an action on the case for keeping a dog which bit the plaintiff, it is not sufficient to shew that the dog was of a fierce and savage disposition, and usually tied up by the defendant, and that the defendant promised to make a pecuniary satisfaction to the plaintiff, after the latter had been bit by the dog. *Beck v. Dyson*, 198

EJECTMENT.

See EVIDENCE, 1, 2, 3.

EVIDENCE.

See BANKRUPT.

1. Upon the trial of an ejectment respecting Black Acre, between *A.* and *B.*, in which it was necessary for *A.* to prove that he was the legitimate son of *J. S.—A.*, after

proving by other evidence that *J. S.* was his reputed father, offered to give in evidence a deposition made by *J. S.* in a cause in Chancery, instituted by *A.* against *C. D.* in order to perpetuate testimony to the alleged fact disputed by *C. D.* that he was the legitimate son of *J. S.*, in which character he claimed an estate in remainder in White Acre, which was also claimed in remainder by *C. D.*.—*B.* the defendant in the ejectment, did not claim Black Acre under either *A.* or *C. D.* the plaintiff and defendant in the Chancery suit.—Held by the Judges (*Graham* B. dissentient) that according to law, the deposition of *J. S.* could not be received upon the trial of such ejectment against *B.* as evidence of declarations of *J. S.* the alleged father, in matter of pedigree. *Berkely Peerage Case,* 401

2. Upon the trial of an ejectment respecting Long Acre, between *E.* and *F.*, in which it was necessary for *E.* to prove that he was the legitimate son of *W.*, the said *W.* being at that time dead—*E.*, after proving by other evidence that *W.* was his reputed father, offered to give in evidence, an entry in a Bible, in which Bible *W.* had made such entry in his own hand-writing that *E.* was his eldest son, born in lawful wedlock from *G.* the wife of *W.*, on the 1st day of May 1778, and signed by *W.* himself. Held by the Judges unanimously that such entry in such Bible (or in any other book, or on any other piece of paper,) could be received to prove that *E.* is the legitimate son of *W.* as evidence of the declaration of *W.* in matter of pedigree. *Ib.*

3. Upon the trial of an ejectment respecting Little Acre, between *N.* and *P.*, in which it was necessary for *N.* to prove that he was the legitimate son of *T.*, the said *T.*

being at that time dead; *N.*, after proving by other evidence that *T.* was his reputed father, offered to give in evidence an entry in a Bible, in which Bible *T.* had made such entry in his own hand-writing, that *N.* was his eldest son, born in lawful wedlock, from *J.* the wife of *T.*, on the 1st day of May 1778, and signed by *T.* himself: and it was proved in evidence on the said trial, that the said *T.* had declared "that he *T.* had made such entry for the express purpose of establishing the legitimacy and the time of the birth of his eldest son *N.*, in case the same should be called in question, in any case or in any cause whatsoever, by any person, after the death of him the said *T.*"—Held by the Judges unanimously, that such entry in such Bible (or in any other book, or on any other piece of paper,) could be received to prove that *N.* is the legitimate son of *T.*, as evidence of the declaration of *T.* in matter of pedigree, (but with strong circumstances of suspicion on account of its particularity.) *Ib.*

4. The official letter of the commander of a convoy, to the admiralty, at the end of the voyage seems good evidence of the facts therein stated respecting the ships under convoy. *Watson v. King,* 272

5. A notarial protest under seal, is no evidence that a foreign bill of exchange has been presented for payment in England. *Chesmer v Noyes,* 129

6. The entry in the office in Somerset House for licensing stage coaches is no evidence to prove that the persons named in the licence are owners of the coach. *Strother v. Willan,* 24

7. An entry in the register-book at the custom-house stating that a certificate of register was granted on an affidavit by *A.* that he was an owner, held not admissible as evi-

- secondary evidence of ownership against A., although all the affidavits on which registers had been granted were burnt at the custom-house. *Teed v. Martin*, 90
8. In an action on a policy of insurance, subscribed by the defendant's agent under a power of attorney, it is sufficient proof of the agency, that the defendant is in the habit of paying losses upon policies so subscribed by the agent in his name, without producing the power of attorney. *Haughton v. Ewbank*, 88
9. Where issue is joined on *non est factum*, some evidence must be given of the identity of the party executing the deed, which is not to be presumed from its having been executed by a person in his name, in the presence of the attesting witness, who was unacquainted with him. *Middleton v. Sundford*, 34
10. If a bond be declared upon as the joint bond of the defendant and two other persons, and the defendant pleads that it is not his deed, at the trial it is only necessary to prove that the bond was executed by the defendant. *Ib.*
11. It is not sufficient *prima facie* evidence of a letter being sent by the post, that it was written by a merchant in his counting-house, and put down upon a table for the purpose of being carried from thence to the post-office, and that by the course of business in the counting-house, all letters deposited on this table are carried to the post-office by a porter. *Hetherington v. Kemp*, 193
12. Although a person has been improperly examined before commissioners of bankrupt upon a subject unconnected with the interests of the bankrupt estate, with a view to procure evidence in an action depending against him, the examination may be used as evidence by the plaintiff at the trial of the action, and the Judge at Nisi Prius cannot inquire into the abuse of the authority of the great seal by which the examination was obtained. The remedy of a party so improperly examined, is by an application to the Lord Chancellor to have the examination taken off the file and cancelled. *Stockfleth v. De Tastet*, 10
13. In an action against the sheriff for a false return to a writ of *s. f.* where the defence rests upon the validity of a commission of bankruptcy, if it appears that the assignees are the real parties, a declaration by one of them who was the petitioning creditor, made subsequently to the going out of the commission, that the bankrupt did not owe him 100*l.* is admissible evidence on the part of the plaintiff. *Dowden v. Fowle*, 38
14. To prove an examined copy of an Irish judgment, it is not enough for the witness to say that he examined the copy with a record produced to him in the room over the Four Courts at Dublin, where the records of the superior Irish courts are kept, without seeing whence the record in question was taken, or knowing the person who produced it to be an officer of the court. *Adamthwaite v. Syng*, 372
15. In ejectment for a house, to shew that it is situate in the parish mentioned in the declaration, it is *prima facie* evidence, that the place in which it stands is watched by the watchman of that parish. *Doe d. Gunson v. Welch*, 264

EXECUTION.

See INSOLVENT.

The validity of an execution under a *f. f.* cannot be impeached at Nisi Prius on the ground that the

judgment ought to have been revived by *scire facias*, or that there was an irregularity in the return of the writ. *Habberton v. Wakefield*, 58

of the foreign court; or evidence must be given that the court has no seal, and then the judgment may be established by proving the handwriting of the judge. *Alves v. Bunkbury*, 28

EXECUTORS AND ADMINISTRATORS.

See INSURANCE BROKERS.

If a plaintiff suing in trover as administrator is so described on the face of the declaration, and makes a protest in curia of the letters of administration, it is unnecessary on not guilty pleaded, to produce them at the trial, although the cause of action accrued after the death of the intestate. *Watson v. King*, 272

FIRE, INSURANCE AGAINST.

See COVENANT, 1.

1. A coffee-house is not an inn, within the meaning of a policy of insurance against fire, enumerating the trade of an inn-keeper, with others, as double hazardous. *Doe v. Laming*, 76
2. Policy of insurance against fire on a manufactory: From the negligence of a servant of the assured in not opening a register, smoke and heat from a stove used in the manufactory are forced into a room, and greatly damage goods, without actually burning any, the fire not being greater than it ought to have been, had there been free vent for the smoke and heat:—This held not to be a loss within the policy. *Austin v. Drew*, 360

FOREIGN JUDGMENT.

See EVIDENCE, 14. INTEREST.

1. In an action on a foreign judgment, the judgment produced at the trial must be authenticated by the seal

The written laws of a foreign state, can only be proved by copies properly authenticated. *Miller v. Heinrich*, 155

FREIGHT.

See DEMURRAGE. LIEN, 4. SHIP.

1. Where there is a charter-party covenanting for payment of freight on a right and true delivery of the goods at a foreign port, the freighter is not discharged by the master there taking from the freighter's agent, who was furnished with funds to pay him the freight, a bill of exchange upon a third person, by whom it is accepted; if the bill is not duly honoured; although the agent fail with the amount of the freight in his hands; unless the master had the offer of a cash payment, and preferred the bill for his own convenience. *Marsh v. Pedder*, 257
2. There is an agreement to carry a passenger on board a ship, from London to the West Indies, the passage-money to be paid in London before the commencement of the voyage. The passenger puts his baggage on board in the Thames, meaning himself to embark at Portsmouth. The ship is lost in going round to that place.—The passage-money cannot be recovered back. *Aliter* if the agreement had been to carry the passenger from Portsmouth to the West Indies. *Gillan v. Simpkin*, 241
3. In an action for freight, damage done to the goods by bad stowage

cannot be given in evidence, either as a complete defence, or in mitigation of damages. *Sheels v. Davies,*

119

4. Under a covenant in a charter-party to pay freight of skins by the pound, net weight at the King's beam,—freight is due on the outside skins in which the packages are contained. *Moorsom v. Page,*

103

5. Where the master of a ship was hired for a voyage to the East Indies by a written agreement, which stipulated that he should receive 120*l.* "in lieu of privilege;" and a question arose whether he was entitled to the freight of goods carried in the cabin, which depended chiefly upon the disputed meaning of the word "*privilege*;" held that what the parties said upon the subject before and at the time when the agreement was entered into, was admissible in evidence, and that the owner then having told the master he should have the use of the cabin for his own benefit, the latter had a right to retain the cabin freight. *Birch v. Depcyster,*

385

HORSE.

See WARRANTY, 1.

INDEBITATUS ASSUMPSIT.

See ASSUMPSIT INDEBITATUS.

INDICTMENT.

1. A baker who sells bread containing alum in a shape which renders it noxious, is guilty of an indictable offence, if he ordered the alum to be introduced into the bread, although he gave directions for mixing it up in a manner which would have rendered it harmless. *Rex v. Dixon,*

12

2. The question of exemption from toll cannot be tried in an indict-

ment against the turnpike keeper for extortion in taking the toll, unless the ground of exemption was specified to him at the time when the toll was taken. *Rex v. Hamlin,*

379

INFANCY.

1. A person is liable as acceptor of a bill of exchange, which was drawn while he was an infant, but was accepted by him after he came of age. *Stephens v. Jackson,* 164
2. Infancy is a good defence to an action on the warranty of a horse. *Howlet v. Haswell,*

118

INSOLVENT.

If a person who has been discharged under an insolvent act, which vests his effects in the clerk of the peace until an assignee is appointed, be permitted by the body of his creditors to continue in possession of the effects which belonged to him before his discharge, no assignee being appointed; these effects, whether mentioned in his schedule or not, cannot be taken in execution by a creditor who afterwards obtains judgment against him. *Hindle v. Bell,*

383

INSURANCE.

See PARTNERSHIP, 1.

1. A policy in the common form by an insurance club, where the members are not responsible for the solvency of each other, is valid, although the sums which they respectively insure are not specified on the face of the policy. *Dowell v. Moon,*

166

2. A policy of insurance containing a warranty that the ship shall sail on or before a given day, may be altered, pending the risk, by a memorandum, whereby the under-

- writers, in consideration of a further premium, agree to cancel the warranty, and to make a return of premium if the ship sail with convoy. *Ridsdale v. Sheddon*, 107
3. A policy in the common form, upon goods to the East Indies, ceases when the ship has delivered the company's outward cargo at a port in the East Indies, and will not protect the goods to a market in an intermediate voyage made by the ship before her final departure for Europe. *Richardson v. London Ass. Co.*, 94
4. Policy on ship "at and from Antigua to England, with liberty to touch at all or any of the West India Islands, Jamaica included." Held, that the ship under the protection of this policy might touch at any of the W. India Islands, although not in the direct course from Antigua to England, and stay at such as she visited the time necessary to complete her homeward cargo. *Metcalf v. Parry*, 123
5. Where a ship insured is warranted to depart on or before a given day, she must actually be out of her port of departure on that day. *Moir v. Royal Exchange Ass. Co.*, 84
6. A policy at and from Portneuf, a place above Quebec, contained a warranty to sail on or before 28th October. Before that day the ship actually did sail from Portneuf to Quebec with a crew sufficient for river navigation. She did not obtain her custom-house clearances at Quebec (where all ships coming down the St. Lawrence clear out) till the 29th, and she there received some men on board to complete the crew for the voyage. For want of a pilot she did not proceed from Quebec till the 30th. Held that under these circumstances the warranty to sail on or before 28th October had not been complied with. *Ridsdale v. Newnham*, 111
7. A licence by the crown "to A. & B. on behalf of themselves and other British or neutral merchants permitting the vessel J. to sail in ballast from London to Holland, notwithstanding any thing contained in H. M.'s order in council of 26th April 1809," held to be insufficient to legalize a policy of insurance on the ship in this voyage on behalf of the owner who was an alien enemy. *Grigg v. Scott*, 339
8. A prospective licence from the crown for a voyage from an enemy's country, granted after the voyage has commenced, is insufficient to render it legal: But if the parties to a policy of insurance on this voyage contemplated the obtaining of a licence, the premium may be recovered back by the assured from the underwriters. *Henry v. Staniforth*, 270
9. A retrospective licence granted by the S. S. Company is insufficient to legalize a voyage from the South Seas; nor does it make any difference that the goods brought home are the proceeds of the onward cargo of a ship to which a prospective licence was regularly granted. *Cowle v. Barber*, 100
10. To constitute a *stranding* within the meaning of that term in a policy of insurance, it is not enough that the ship strikes on a rock and falls on her beam ends. *M'Dougle v. R. E. Ass.*, 383
11. One English ship fires at and sinks another, under the mistaken notion that she is a French privateer. This is not a loss by the *perils of the seas*. *Cullen v. Butler*, 289
12. Where a policy of insurance contains a warranty against seizure in port, if the ship, to avoid such seizure, runs to sea before she is

- properly loaded, and is, in consequence, obliged to go to a port out of the course of the voyage insured, the underwriters are not liable for a subsequent loss. *O'Reilly v. Royal Exchange Ass.*, 246
13. Where a policy of insurance contains no warranty against seizure in port, if the ship to avoid such seizure runs to sea before she is properly loaded, and is in consequence, obliged to go to a port out of the direct course of the voyage insured, the underwriters are liable for a subsequent loss. *O'Reilly v. Gonne*, 249
14. A loss arising from rats eating holes in the ship's bottom is not within the perils insured against by the common form of a policy of insurance. *Hunter v. Potts*, 203
15. Policy "on 40 carboys of vitriol." They were carefully stowed on deck, but caught fire, and were necessarily thrown overboard during the voyage: Carboys of vitriol are sometimes stowed on the deck and sometimes hedged in sand in the hold, where they are considered safer: Held that the underwriters in this case were liable, although there was no communication to them that the carboys were to be stowed on deck. *Da Costa v. Edmonds*, 112
16. Held that the underwriters on goods insured from London to Demerara were only liable for an average loss, where the ship being captured and recaptured was sent into St. Thomas's strip of all her hands, and the captain not being able on his arrival there to procure a fresh crew, or to raise money to pay the salvage, immediately sold the ship and cargo, and broke up the adventure. *Underwood v. Robertson*, 138
17. In an action on a valued policy it is no defence to prove that the assured have received the amount of the valuation in this policy from the underwriters on another policy, if the subject-matter insured be proved to be of a value equal to the sum received and that sought to be recovered. *Bousfield v. Barnes*, 228
18. It seems that a policy of insurance "at and from Gibraltar" will attach if the ship enters Gibraltar Bay, although she does not actually touch at the Garrison. *Park v. Hamond*, 344
19. A ship insured is to be considered as having sailed with convoy from a particular port, if she joined the convoying ship and received sailing instructions within the limits of the port, although the latter ship dropped down 15 leagues from the place of loading with the greatest part of the fleet, several days before the ship insured, she being detained with some other ships for want of pilots. *Ridsdale v. Sheddron*, 108
20. In an action on a policy of insurance, it will be presumed that the ship complied with the provisions of the convoy act, till the contrary is proved. *Thornton v. Lance*, 231
21. Where there are no convoys appointed at the port from which a ship commences her homeward voyage, she is not bound to call for convoy at a port in the course of the voyage from which convoys are appointed. *Park v. Hamond*, 344
22. Where there is an insurance on freight, if the ship be chartered for the voyage, and is guilty of a deviation after sailing upon it and before any goods are loaded, the assured are not entitled to any return of premium for short interest. *Moses v. Pratt*, 297
23. To invalidate a policy on a ship on the ground that she sailed without convoy, it is necessary to prove

' that this happened with the privity
of the owner. *Metcalfe v. Parry*,

125

24. Where there is a warranty in a
policy of insurance, that the ship
shall sail with convoy, she may sail
without convoy from her loading
port to the place of rendezvous for
convoy for the voyage : although
there be convoy for ships on other
destinations between the loading
port and place of rendezvous. *War-
wick v. Scott*, 62

INSURANCE BROKER.

See LIEN, 2.

1. Insurance brokers were ordered to
effect a policy "at and from Tene-
riffe to London :" Held that they
were liable for not inserting in it
a liberty "to touch and stay at all
or any of the Canary islands," that
being usually inserted in policies
from Teneriffe. *Mallough v. Bar-
ber*, 150

2. Where an insurance broker, when
instructed to effect a policy on
goods, is informed that they were
loaded at a prior port to that from
which the risk is to commence,
he is liable to an action for negli-
gence, if he effects the policy in
the common form, "beginning the
adventure upon the said goods from
the loading thereof aboard the said
ship." *Park v. Hamond*, 344

3. Insurance brokers who have
effected a policy without notice that
it is not on account of the person
from whom they receive the order,
have a lien upon it for their gene-
ral balance due from him, and
have a right to apply to the satis-
faction of that balance money re-
ceived upon the policy, as well after
as before notice that it belongs to
a third person ; but if they pay
the overplus received after such
notice to the agent, the amount
may still be recovered from them in
an action for money had and re-

ceived by the principal. *Mann v.
Forrester*, 60

4. Insurance brokers holding a pol-
icy on which a loss has happened,
come to a general settlement of
their account with one of the un-
derwriters, including his subscrip-
tion to this policy, and for the
balance found due, which was ra-
ther less than that amount, take a
bill of exchange from him at three
months, but without erasing his
name from the policy : This bill
they retain in their own possession,
and on the underwriter's becoming
bankrupt, prove it upon his estate
as a debt due to themselves :—
Held that under these circum-
stances, they were liable to the as-
sured for the amount of the sub-
scription. *Wilkinson v. Clay*,

171

5. In an action for premiums of in-
surance by the executors of an
underwriter, against an insurance
broker, he cannot set off or de-
duct returns of premium which
accrued after the death of the testa-
Houston v. Robertson, 342

6. Held that insurance brokers, who,
without a *del credere* commission,
had effected policies in their own
names, in which they were de-
scribed "as agents," could not, in
an action for premiums by the as-
signees of a bankrupt underwriter,
who had subscribed these policies,
set off a total loss which had hap-
pened before the bankruptcy, but
which had not been adjusted ; al-
though the policies had always re-
mained in their hands, and they
had actually paid the amount of
the loss to their principal. *Baker
v. Langhorn*, 396

INTEREST.

The plaintiff is not entitled to in-
terest in an action on a foreign
judgment. *Atkinson v. Lord Bray-
brooke*, 380

LANDLORD AND TENANT.*See BANKRUPT, 6.*

1. If after the expiration of a written lease containing a covenant by the tenant to keep the premises in repair, he verbally agrees to hold over, paying an additional rent, nothing more being expressed between the parties respecting the terms of the new tenancy, he is presumed to hold under the covenants of the former lease, as far as they are applicable to his new situation; and if the premises are afterwards burnt down by accidental fire, he is bound to rebuild them.

Digby v. Atkins, 275

2. If a lease contains a covenant by the tenant to keep the premises in repair, and a covenant to insure them for a specific sum against fire;—on their being burnt down, his liability on the former covenant is not limited to the amount of the sum to be insured under the latter.

Ib.

3. Whether a landlord can follow and distrain upon goods fraudulently removed from the premises the night before the rent became due, for the purpose of avoiding a distress?

Furneaux v. Fotherby, 136**LICENCE.***See INSURANCE, 7, 8, 9.***LIEN.***See INSURANCE BROKER, 3.*

1. A shipwright in the River Thames has no lien on a ship taken into his dock to be repaired, without an express agreement for that purpose—credit being given by the usage of trade to the owner of the ship for the repairs. *Aliter* where a shipwright deals for ready money.

Raith v. Mitchell, 146

2. If A. employs B. to effect a policy of insurance for his benefit, and B. without A.'s knowledge

VOL. IV.

employs C. to effect the policy, representing himself to C. as the principal;—C. has a lien on the policy as against A. for the general balance due to him from B. *Westwood v. Bell,* 349

3. Upon the sale of leasehold premises, the purchaser accepts bills of exchange for the purchase money; and the original lease and the assignment executed by the seller are deposited with a third person as a collateral security, to be delivered up to the purchaser on payment of the bills. The seller, after some of the bills are paid, gets possession of the lease from the depositary, and pledges it with persons who *bona fide* advance money upon it, and to whom he endorses the outstanding bills.—Held that the pawnees had no lien on the lease beyond the amount of these bills. *Hooper v. Ramstotom,* 121

4. A ship is chartered for a particular voyage for a gross sum by way of freight. The captain signs bills of lading for the cargo, (which is the property of, and consigned to a third person,) specifying a rate of freight amounting to a less sum than that mentioned in the charter-party. Held that the ship owner had no lien on the cargo beyond the freight specified in the bills of lading. *Mitchell v. Seafise,* 298

5. An issue out of Chancery, on the question whether J. S. had at a particular time any *lien* on certain goods or their produce, must be found in the negative, if J. S. was not in possession of the goods or their produce, whatever equitable interest he might have in them. *Haywood v. Waring,* 291

LINCOLN'S INN.

An action at law may be maintained upon the bond usually given to the Society of Lincoln's Inn on

being called to the bar, to recover arrears of "absent commons," "vacation commons," "preachers' duties," and "pensions," which have accrued while the party has remained a member of the Society, although he has not lived in the Inn, or practised at the bar. *Lord Rosslyn v. Jodrell,* 303

LONDON DOCK COMPANY.

The London Dock Company are liable for the negligence of their servants in unloading goods, although the company derive no profit from their labour. *Gibson v. Inglis,* 72

MALICIOUS ARREST.

See ARREST, MALICIOUS.

MONEY HAD AND RECEIVED.

Agents in England effect a policy of insurance for a correspondent abroad, on which a loss happens: He draws a bill upon them, which is presented to them for acceptance by the indorsee: They say they cannot accept it, having no funds in hand, but that on a settlement with the underwriters it shall be paid: The agents receive from the underwriters a sum less than the amount of the bill: Held that this might be recovered from the agents by the indorsee, as money had and received to his use. *Langston v. Corney,* 176

MONEY PAID.

See ACTION, 2.

MUTUAL CREDIT.

See INSURANCE BROKER, SET-OFF.

A. being indebted to *B.*, on going abroad leaves a general power of attorney with him, and sends an order to *C.*, to whom he had consigned goods for sale, to remit the

proceeds to *B.* on his account.—*C.* sells the goods, and remits the proceeds to *B.*—Afterwards, and before the money was received by *B.*, *A.* commits an act of bankruptcy. Held that *B.* might apply the proceeds in satisfaction of the debt due to him from *A.* *Alley v. Hotson,* 325

PARISH.

See EVIDENCE, 15.

PARTNERSHIP.

1. Although one part owner of a ship has no implied authority, as such, to order insurances to be effected on account of the other part owners; yet if they be in partnership together, an order to insure the ship given by one renders all liable. *Hooper v. Lushy,* 66

2. Where there is a partnership constituted by deed, a notice that it is dissolved signed by the parties, for the purpose of being inserted in the Gazette, is sufficient evidence of the dissolution for all purposes against the parties signing it. *Doe v. Miles,* 373

PLEADING.

1. In trespass for taking goods, where the defence is, that they were taken as a distress for rent, having been clandestinely removed from the premises, this must be specially pleaded. *Furneaux v. Fotherby,* 136

2. If a bill of exchange purports to be drawn by a firm consisting of several persons, in an action by the indorsee against the acceptor, the declaration may aver that certain persons using that firm drew the bill, although in point of fact the firm consisted of a single individual. *Bass v. Clive,* 78

3. Where the defendant nails to his own wall a board which overhangs the plaintiff's close, the remedy

seems to be case and not trespass.
Pickering v. Rudd, 219

4. If a bankrupt promises absolutely to pay a debt barred by his certificate, *indebitatus assumpsit* lies against him on the original consideration; but if he only promises conditionally, the plaintiff must declare specially, and prove the condition performed. *Penn v. Bennett,* 205

5. If there be a conditional promise to pay a bill of exchange presented for acceptance, after the condition has been performed, this cannot be declared upon as an absolute acceptance of the bill. *Langston v. Corney,* 176

6. Where a policy in the common printed form on ship and goods contains a written memorandum, declaring the insurance to be on goods, a general averment is proper that the defendant became an insurer on the premises in the policy mentioned. *Haughton v. Fawbank,* 89

PEDIGREE.

See EVIDENCE, 1, 2, 3..

POLICY.

See INSURANCE, FIRE, INSURANCE AGAINST.

PRACTICE.

1. Where several defendants appear by separate attorneys and have separate counsel, if they are in the same interest, only one counsel can be heard to address the jury, and the witnesses are to be examined by one counsel on the part of all the defendants, in the same manner as if the defence were joint. *Chippendale v. Masson,* 174

2. An application may be made to a Judge at Nisi Prius, to put off the trial of an issue directed by the Lord Chancellor. *Buxton v. Lawton,* 163

PREMIUMS OF INSURANCE.

See INSURANCE, INSURANCE BROKER.

PRINCIPAL AND AGENT.

See INSURANCE BROKER, SHIP BROKER.

1. A power of attorney, though coupled with an interest, is instantly revoked by the death of the grantor; and an act afterwards *bond fide* done under it, by the grantee, before notice of the death of the grantor, is a nullity. *Watson v. King,* 272

2. An agent who underwrites and settles losses for another, has an implied authority from him to refer a dispute about a loss to arbitration. *Goodson v. Brooke,* 163

3. A factor who sells goods in his own name without a *dei credere* commission, is a good petitioning creditor against the purchaser, although he has merely communicated the name of the purchaser to his principal. But he ceases to be so, when the principal has agreed with him to consider the purchaser as his debtor, and has taken steps for recovering the debt directly from the purchaser. *Sadler v. Leigh,* 195

4. Held to be a lawful usage in the Irish provision trade, that a general authority to a broker to sell expires with the day on which it is given, and that a contract for the sale of the goods afterwards entered into by the broker, is not binding on the principal. *Dickenson v. Lillicall,* 279

5. In an action for not accounting for goods delivered in this country to the defendant, the master of a ship, to be sold by him abroad, it is no defence that the goods were exported without paying duties, unless it be proved that the evasion of the duties was part of the agree-

- ment between the plaintiff and defendant. *Catlin v. Bell*, 183
 6. If goods are delivered to *A.* to be sold ~~by~~ him in a particular place, although he is unable to sell them there, he has no right to send them elsewhere, under the care of another person in search of a market. *Ib.*

PRIZE.*See ACTION, 1.***PRIZE AGENT.**

- A person who while regularly licensed as a prize agent received orders for prize money from seamen, is not guilty of an offence within 49 G. 3. c. 123. s. 35. by receiving payment of these orders after his licence has expired. *Rex v. Davis*, 48

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROPERTY-TAX.

- In an action for rent, to entitle the tenant to deduct the property-tax, it is sufficient to prove the payments by the collector, without producing the assessment. *Phillips v. Beer*, 266

PROTEST.*See EVIDENCE, 5.***RIOT ACT.**

1. To render the hundred liable on the riot act for partial damage done to a house, the rioters must have begun to demolish it with the intention of actually demolishing it, if not interrupted. *Lord King v. Chambers*, 377
 2. In an action against the hundred on the riot act, for damage done to a house; the breaking of inside window shutters, a window sill, and the wood of the fan-light, is sufficient evidence of a beginning to

pull down, if the mob are interrupted and dispersed while committing these acts of violence, by an alarm of the approach of the military. *Sampson v. Chambers*, 221

SALE.*See AGREEMENT.*

Where goods are ordered of a manufacturer in England to be exported to a foreign country, and the purchaser has no opportunity of seeing them before they are shipped, there is an implied undertaking on the part of the manufacturer that they shall be of a merchantable quality. *Laing v. Fidgeon*, 169

2. Where upon a sale of goods, the seller produces a sample, and represents that the bulk is of equal quality, if there be a sale-note which does not refer to the sample, this is not a sale by sample; and if the goods turn out to be of inferior quality, the purchaser's remedy is by an action on the case of a deceitful representation. *Meyer v. Everth*, 22
 3. Where leasehold premises are sold by auction, and the lease containing the usual covenant to repair is produced and read to the bidders, if any of the buildings demised and described in the lease have been pulled down before the sale, the purchaser is not bound to complete the purchase, and may recover back his deposit, although the building pulled down be not described in the particulars of sale. *Granger v. Worms*, 83

4. A contract for the sale of flax expected from Petersburgh, contained a stipulation, "that the flax should be dispatched from Petersburgh not later than 31st July, O. S. either for Hull or London." Held to be enough, that before the day specified, the flax had been sent down

from Petersburgh in lighters and put on board the ship at Cronstadt, although she was not dispatched on her homeward voyage till after the day. *Busk v. Spence*, 329

5. A stipulation in such a contract, that "as soon as the seller knows the name of the vessel in which the flax will be shipped, he is to mention it to the buyer," forms a condition precedent: and where the seller had advice of the name of the ship in London on the 12th of the month, and did not communicate it to the buyer who resided at Hull till the 20th, held that the condition was broken, and that the buyer was released from the contract, although he did not appear to have sustained any damage by the delay. *Ib.*

SEAMEN'S WAGES.

1. Held that on a count for work and labour a seaman might recover for wages during a hostile embargo in a foreign port, while he was imprisoned on shore, on proof that the crew were restored to the ship, and that she completed the voyage and earned freight, without producing the order by which the embargo was taken off. *Delamain v. Winteringham*, 186

2. A demand being made by a seaman on the owner of a ship for wages, which had accrued during an embargo, he said, if others paid, he should do the same. Held that this was a sufficient acknowledgement to take the case out of the statute of limitations. *Loweth v. Fothergill*, 185

SET-OFF.

See INSURANCE BROKER, 5, 6.

1. Where the plaintiff declares specially in assumpsit for not accounting, —with a count for money had and received, *non assumpsit* being pleaded to the whole declaration,

and a set-off to the general count; the plaintiff having proved a balance to be due to him which he might have recovered under either count, the defendant shall not be deprived of the benefit of his set-off, and if he establishes it, he is entitled to a verdict on the whole declaration. *Birch v. Depyster*, 385

2. In an action by a servant against his master for wages, the latter cannot generally set off the value of goods lost by the negligence of the former: but if it be proved to have been part of the original agreement between them, that the servant should pay out of his wages for all his master's goods lost through his negligence, the value of goods so lost may, under the general issue, be deducted from the amount of the wages. *Le Loir v. Bristow*, 134

SHERIFF.

See EVIDENCE, 13. EXECUTION,
INSOLVENT.

The assignment of a replevin bond by a person acting in the sheriff's office, under the seal of the office, is sufficient. *Middleton v. Sandford*, 36

SHIP.

See EVIDENCE, 7. DEMURRAGE,
FREIGHT.

1. A foreign built ship, British owned, was authorized by 43 Geo. 3. c. 153, s. 13, to import into Great Britain the articles therein enumerated.

But that statute, which permits the importation into Great Britain in such a ship of "all sorts of wool," does not extend to cotton. *Pearce v. Cowie*, 363

2. A ship is not of the *built* of Russia within the meaning of the navigation act, which, having been originally constructed in another country, was wrecked on the coast of Russia, and repaired there at

- an expence of more than two-thirds of her value; although by the law of Russia she was under these circumstances to be considered a Russian ship, and although she afterwards had a Russian register, was owned by a Russian subject, and was navigated under the Russian flag. *Redhead v. Cater*, 188
3. A general ship having been advertised for a particular voyage, if her destination is in any respect altered, the owner is bound to give specific notice of the alteration to every person who ships goods on board. *Peel v. Price*, 243
4. There is no implied undertaking on the part of the owner of a ship, that a bill of exchange drawn by the master on a third person, for money advanced for the ship's use abroad, shall be duly honoured. *Harder v. Brotherton*, 254
5. A chartered ship, at her outward port, being in want of money for her necessary disbursements, a merchant there being shewn the charter-party, by which the freighter covenants to furnish what money might be required for the necessary disbursements of the ship, advances the requisite sum to the master, and takes a bill of exchange drawn by him for the amount upon the freighter; held that on this bill being dishonoured by the freighter, the owner of the ship was not liable for any part of the money advanced. *Ib.*
6. Where by a charter-party of affreightment the owner of the ship covenants that she shall be furnished with *every thing useful and necessary for the voyage*, he is bound to furnish her not only with all documents required by the law of this country, but such as are required for her immediate admission into the foreign port mentioned in the charter-party: therefore, where by such a charter-party a ship was let to freight for a voyage to Sardinia and back held that the owner was liable for not furnishing her with a bill of health, without which by the law of Sardinia she could not be admitted into port before performing quarantine. *Levy v. Costerton*, 389
7. In an action against the owners of a ship, it is sufficient *prima facie* evidence of ownership, to put in an undertaking to appear for them, given before the commencement of the action by the person who subsequently acted as their attorney in defending it, in which he describes them as owners;—without further proof of agency. *Marshall v. Cliff*, 133
8. In an action against the owner of a ship for breach of an undertaking to sail with convoy, it is a sufficient defence to shew that the ship was delayed in taking on board the plaintiff's goods, and that after receiving them the master, having made every practicable exertion to join the convoy with which he ought to have sailed, but without effect, proceeded on his voyage without convoy. *Magalhaens v. Busher*, 54
9. A bill of lading signed by the captain, stating the ship to be bound to the port of destination with convoy, amounts to an undertaking binding on the owner, that the ship shall sail with convoy. Where there is an undertaking to sail with convoy, it is not a sufficient excuse that the ship was prevented from joining the convoy by the state of the weather. *Sanderson v. Busher*, 54 n.
10. Where by a charter-party the freighter covenanted to provide for the ship a full and complete cargo, consisting of copper, tallow, and hides, or other goods, on which separate rates of freight were to be paid;—held that having supplied

her with as large a quantity of tallow and hides as she chose to take on board, he was not bound to provide any copper; although for the want of it the ship was obliged to keep in her ballast, and did not make so advantageous a freight as she otherwise would have done.

Moorsom v. Page, 103

11. Where goods destined to a foreign port, are captured in consequence of a deviation, the owners of the goods are entitled to recover from the owners of the ship only the prime cost of the goods, together with the shipping charges, and not the expence of effecting a policy of insurance upon them, without direct proof that the goods at the time of the loss were enhanced in value beyond their first price to the amount sought to be recovered for insurance. *Parker v. James,* 112

SHIP BROKER.

By the usage of trade in London, a broker who acts as such in chartering a ship to the *Baltic* is entitled to a commission of 5 per cent. upon the amount of the freight. *Cohen v. Payet,* 96

STAMPS.

See Bills of Exchange. 6, 7.

Where indorsements of receipts on a bond have left no blank space for receipts of subsequent payments to be written upon, such receipts written on an unstamped piece of paper, annexed to the bond, may be read in evidence. *Orme v. Young,* 336

STATUTES.

Jac. I.

1, c. 15. (Act of Bankruptcy) 286

William 3.

8 & 9, c. 11. (Certificate for Costs) 137

Ann.

8, c. 9. (Copyright)	8
9, c. 21. (S. S. Company).	101

Gen. 1.

1, st. 2, c. 5. (Action against Hundred)	221, 377
--	----------

Geo. 2.

2, c. 23. (Attorney's Bill)	68
7, c. 8. (Stock-jobbing)	45
11, c. 19. (Distress)	137, 368

Geo. 3.

25, c. 51. (Stage Coaches)	24
33, c. 54. (Benefit Societies)	5
37, c. 98. (Alum)	13
43, c. 153. (Navigation Act)	363
49, c. 121. (Notice to dispute Bankruptcy)	207

STOCK JOBBING.

Dealing in lottery produces is not within the stock-jobbing acts. *Mortimer v. Skeld,* 42

STOPPING IN TRANSITU.

1. Although goods are delivered at the packes of the purchaser, he having no archoose of his own, if they were to be paid for in ready money, and this was intimated to the packerhen he received them, they may sl be stopped *in transitu.* *Lechman v. Williams,* 181

2. A particul parcel of goods in the possession of a warehouseman, is sold at so much per cwt. the weight of the whc being uncertain, to be paid by bill of exchange. The vendor give the purchaser an order to the warehouseman to weigh and deliver the ods, which is lodged with the waouseman: but before the goods are weighed the purchaser becomes insolvent. The vendor has right to stop them *in transitu.* *ithers v. Lys,* 237

.. Goods being entered in the books of the West India Dock Company in the name of *A.*, he receives the usual cheque for them, which, having sold the goods to *B.*, he endorses and delivers to him. *B.* sells the goods, and delivers the cheque to *C.* on credit. On *C.*'s insolvency, *A.* cannot lawfully take possession of the goods, although they have continued to stand in his name, and the cheque has not been lodged with the Dock Company. *Spear v. Travers,* 251

4. If the purchaser of goods to be paid by bill, after giving his acceptance, during the time of credit, and while the goods are *in transitu*, sells them to a third person for a valuable consideration, without transferring any bill of lading to him, the right of the original vendor to stop the goods *in transitu* is taken away. *Davis v. Reynolds,* 267

5. *A.* being indebted to *B.* on the balance of accounts, including bills of exchange still running accepted by *B.* for *A.*, consigns goods to *B.* on account of this balance. Held, that *A.* has no right to stop the goods *in transitu*, upon *B.* becoming insolvent before the bills are paid. *Vertue v. Jews,* 31

6. The right of an unpaid consignor to stop *in transitu* not taken away by an assignment of the bill of lading for a valuable consideration to a third person, with notice of the insolvency of the consignee. *Ib.*

STRANDIN.

See INSURANCE. 10.

TENDER

An offer to pay a sum money to be accepted as the whole balance due, where a larger sum claimed, does not amount to a legal tender. *Evans v. Judkins,* 156

S. P. ruled by *Holroyd J.* in *Shepard v. Harris*, Monmouth Spring Assizes, 1816, where the less sum was offered to the plaintiff "in full of his demand."

TRESPASS.

See PLEADING, 3.

TROVER.

Trover lies for an undivided part of a chattel. *Watson v. King,* 272

VARIANCE.

See BRIDGE.

1. If in an action on a bond against one, it be declared on as the joint bond of him and two others, it is no variance that the bond is likewise the separate bond of each of the obligors. *Middleton v. Sandford,* 34

2. In covenant for not repairing, if the covenant to repair contains an exception of "fire and all other casualties," it is fatal on *non est factum*, to state it as a general covenant to repair, omitting the exception. *Tempany v. Burnand,* 20

3. In declaring against the acceptor of a bill of exchange payable a certain time after sight, the day of accepting the bill laid in the declaration under a *videlicet* is immaterial. *Freeman v. Jacob,* 209

VENDOR AND PURCHASER.

See AGREEMENT. *SALE.*

USAGE OF TRADE.

See PRINCIPAL AND AGENT, 4.

USURY.

1. An agreement, that, upon the advance of a sum of money by *B.* to *A.*, *A.* shall assign to *B.* the lease of premises of greater value, with a power of redemption on repayment

of the money, and that in the mean time *B.* shall grant *A.* an underlease of the premises at a greater rent than the legal interest of the money,—*A.* insuring the premises, and paying the ground rent and taxes,—is usurious; and the assignment of the lease executed under such agreement is void. *Doe d. Titford v. Chambers,* 1

WAGER.

1. An action cannot be maintained upon a wager, whether an unmarried woman has had a child. *Ditchburne v. Goldsmith,* 152
2. No action can be maintained to recover back money deposited with a stakeholder upon a wager, after the wager has been determined against the plaintiff. *Brandon v. Hibbert,* 37
3. The party who lays a wager on the identity of a person with whom he has conversed, cannot set it aside on the ground that at the time when it was laid the opposite party had received certain information that he was mistaken, and it is too late for him, on discovering his mistake, to countermand the authority of the stakeholder to pay over the money betted. *Blond v. Collet,* 157

WARRANTY.

See INSURANCE.

1. A temporary lameness, rendering a horse less fit for present service, is a breach of a warranty of soundness. *Hton v. Brogden,* 231
2. Wherebefore or at the time of sale a specimen of the goods is exhibited to the buyer, if there be a written contract which merely describes the goods as of a particular denomination,—this is not a sale by sample; but there is an implied warranty that they shall be of a merchantable quality of the deno-

mination mentioned in the contract.
Gardiner v. Gray, 144

WAY.

1. Where a way has been used by the public for a great number of years over a close in the hands of a succession of tenants, the privity of the landlord, and a dedication by him to the public may be presumed, although he was never in the actual possession of the close himself, and he is not proved to have been near the spot. *Rex v. Barr,* 16
2. Where a way is so used, notice of the fact to the steward is notice to the landlord. *Ib.*

WHARFINGER.

See ACTION, 2.

1. A wharfinger, by inserting in his receipts for goods, a notice that he will not be responsible for loss by fire may entirely discharge himself from such responsibility. *Maving v. Zadd,* 225

WITNESS.

See EVIDENCE.

1. In a action on the case for running down a ship, a pilot, under whose management the defendant's ship was when the accident happened is rendered a competent witness for the defendant by a release from him, although he was hired and paid by the captain. *Aldriae v. Simmons,* 392
2. In an action by an executor, the residuary legatee is not rendered a competent witness for the plaintiff, by releasing all claim to the debt sought to be recovered, having still an intent to support the action, that the debts may not be a charge upon the estate. *Baker v. Tyrwhitt,* 27
3. In an action for running down a ship, the defendant's captain may

INDEX.

be rendered a ~~competent~~^{credible} witness for him, by a release to the captain, and the rest of the crew, with a single stamp, the captain's name standing first, and the release being first tendered to him. *Perry v. Beacher,* 80

WORDS.

- Where *A.* having summoned *B.* his master before a Court of Con-

science for wages, *B.* there utters words imputing felony to *A.*,—if this charge be necessary to *B.*'s defence no action can be maintained against him by *A.* for defamation: *ulter*, if the words are spoken maliciously, though addressed to the Court. *Trotman v. Dunn,* 211

WORK AND LABOUR.

See ASSUMPSIT INDEBITATUS.

THE END.

A

TABLE
OF
THE CASES
REPORTED IN VOL. IV.

ABRAHAM v. Du Bois	Page 269	Belworth v. Hassel	Page 140
Adamthwaite v. Synge	372	Bennet, Penn v.	205
Adkins, Cary v.	92	Berkeley Peerage Case	401
Aldridge v. Simmons	392	Bessey v. Evans	131
Allan v. Mawson	115	Birch v. Depcoster	385
Alley v. Hotson	325	Bland v. Collett	157
Alves v. Bunbury	28	Bluck v. Thorne	191
Atkinson v. Lord Braybrooke	380	Bouchier, Perry v.	80
<i>—</i> , Digby v.	275	Bourn, Sandom v.	68
Austin v. Drew	360	Bousfield v. Barnes	228
 		Brandon v. Hebbert	37
Back v. Gooch	232	Braybrooke, Lord, Atkinson v.	380
Baker, Laughorn v.	396	Brinkworth, Sugars v.	46
<i>—</i> v. Tyrwhitt	27	Bristow v. Haywood	213
Barber, Cowie v.	100	<i>—</i> , Le Loir v.	134
<i>—</i> , Malhough v.	150	Brogden, Elton v.	281
Barns, Bousfield v.	228	Brooke, Goodson v.	163
Barr, Rex v.	16	Brotherstone, Harder v.	254
Barret v. Dutton	233	Buckingham, Rex v.	189
Bass v. Clive	78	Bunbury, Alves v.	28
Battey v. Townrow	5	Burfitt, Hicks v.	235n.
Beck v. Dyson	198	Burnand, Company v.	20
Beer, Phillips v.	266	Burra v. Clarke	355
Bell, Catlin v.	183	Busher, Magalhaens v.	54
<i>—</i> , Hjindle v.	383	<i>—</i> , Sanderson v.	54n.
<i>—</i> , Westwood v.	349	Busk v. Spence	329

Butler, Cullen v.	Page 289	Doe v. Chanbers	Page 1
Buxton v. Lawton	163	— v. Laming	73
Carey v. Adkins	92	— v. Miles	373
Cater, Redhead v.	188	— v. Welch.....	264
Catlin v. Bell	183	Dowden v. Fowle	38
Chambers, Doe v.	1	Dowell v. Moon	166
—, Lord King v.....	377	Down v. Fromont	40
—, Sampson v.	221	Drew, Austin v.	360
Chesmer v. Noyes	129	Du Bois, Abraham v.	269
Chippendale v. Masson	174	Dunn, Trotman v.	211
Clarke, Burra v.	355	Dutton, Barret v.	333
—, Harman v.	159	Dyson, Beck v.	198
Clay, Wilkinson v.	171	 	
Cliff, Marshall v.	133	Edinunds, Da Costa v.	142
Clive, Bass v.	78	Elton v. Brogden	281
Cohen v. Paget	96	Evans, Bessey v.	131
Collet, Bland v.	157	— v. Judkins	156
Corney, Langston v.	176	Everth, Meyer v.	22
Costerton, Levy v.	389	Ewbank, Haughton v.	88
Cowie v. Barber	100	 	
—, Peirce v.	363	Faith v. Pearson	357
Cullen v. Butler	289	Fidgeon, Laing v.	169
Curtis, Taylor v.	337	Fletcher, Hodgkinson v.	70
 		Forrester, Mann v.	60
Da Costa v. Edinunds	142	Fotherby, Furneaux v.	136
Davenport v. Nelson	26	Fothergill, Loweth v.	185
Davies, Sheels v.	119	Fowle, Dowden v.	38
Davis, Rex v.	48	Freeinan v. Jacob	209
— v. Reynolds	267	French, Kirk v.	214n.
Dauncey, Usher v.	97	Fromont, Down v.	40
De Chemant, Munro v.	215	Furneaux v. Fotherby	136
Delamainer v. Winteringham ..	186	 	
Depcoyster, Birch v.	385	Gandell v. Pontigny	375
De Tastet, Stockfleth v.	10	Gardiner v. Gray	144
Dickeinson v. Lilwall	279	Gibson v. Inglis	72
Digby v. Atkinson	275	Gillan v. Simpkin	241
Ditchburn v. Goldsmith	152	Glossop v. Jacob	227
Dixon, Rex v.	12	Goldie v. Gunston	381
		Goldsmith, Ditchburn v.	152

NAMES OF THE CASES.

ix

Gooch, Back <i>v.</i>	Page 232	Hunter <i>v.</i> Potts	Page 203
Goodson <i>v.</i> Brooke	163	Idle, Hill <i>v.</i>	327
Gonne, O'Reilly <i>v.</i>	249	Inglis, Gibson <i>v.</i>	72
Graham <i>v.</i> Grill	282	Jackson, Stevens <i>v.</i>	164
Granger <i>v.</i> Worms	83	Jacob, Freeman <i>v.</i>	209
Gray, Gardiner <i>v.</i>	144	_____, Glossop <i>v.</i>	227
Greenway <i>v.</i> Hindley	52	James, Parker <i>v.</i>	112
Grigg <i>v.</i> Scott	339	Jewell, Virtue <i>v.</i>	31
Grill, Graham <i>v.</i>	282	Jodrell, Rosslyn, Earl of <i>v.</i> ..	303
Gunston, Goldie <i>v.</i>	381	Judkins, Evans <i>v.</i>	156
Habberton <i>v.</i> Wakefield	58	Kemp, Hetherington <i>v.</i>	193
Halford, Still <i>v.</i>	17	Kieran, Rosher <i>v.</i>	87
Hamlyn, Rex <i>v.</i>	379	King, Lord, <i>v.</i> Chambers	377
Hammond, Park <i>v.</i>	344	_____, Watson <i>v.</i>	272
Harder <i>v.</i> Brotherstone	254	Kirk <i>v.</i> French	214
Harman <i>v.</i> Clarke	159	Kneller, Phipson <i>v.</i>	285
_____ <i>v.</i> Mant	161	 	
Hartley <i>v.</i> Wilkinson	127	Laing <i>v.</i> Fidgeon	169
Hassel, Belworth <i>v.</i>	140	_____, Sills <i>v.</i>	81
Hastings, Walton <i>v.</i>	223	Laming, Doe <i>v.</i>	73
Haswell, Howlett <i>v.</i>	148	Lance, Thornton <i>v.</i>	231
Haughton <i>v.</i> Ewbank	88	Langhorn, Baker <i>v.</i>	396
Haywood, Bristow <i>v.</i>	213	Langston <i>v.</i> Corney	176
Heapy, Richmond <i>v.</i>	207	Lawton, Buxton <i>v.</i>	163
Heinrick <i>v.</i> Millar	155	Leigh, Sadler <i>v.</i>	195
Henry <i>v.</i> Staniforth	270	Le Loir <i>v.</i> Bristow	134
Hetherington <i>v.</i> Kemp	193	Levy <i>v.</i> Costerton	389
Heywood <i>v.</i> Waring	291	Lilwall, Dickinson <i>v.</i>	279
Hibbert, Brandon <i>v.</i>	37	Loeschman <i>v.</i> Williams	181
Hicks <i>v.</i> Burfitt	235 n.	London Assurance Company, Richardson <i>v.</i>	94
Hill <i>v.</i> Idle	327	Loweth <i>v.</i> Fothergill	185
Hindle <i>v.</i> Bell	383	Luntley, Outhwaite <i>v.</i>	179
Hindley, Greenway <i>v.</i>	52	Lusby, Hooper <i>v.</i>	66
Hodgkinson <i>v.</i> Fletcher	70	Lyss, Wishers <i>v.</i>	237
Hooper <i>v.</i> Lusby	66	 	
_____ <i>v.</i> Ramsbottom	121	M'Dougle <i>v.</i> Royal Exchange Assurance Company	283
Hotson, Alley <i>v.</i>	325	Magalhaens <i>v.</i> Busher	54n.
Houston <i>v.</i> Robertson	342		
Howlett <i>v.</i> Haswell	118		

NAMES OF THE CASES.

Mallough <i>v.</i> Barber	Page 150	Page, Moorsom <i>v.</i>	Page 103
Mann <i>v.</i> Forrester	60	Paget, Cohen <i>v.</i>	96
Mant, Harman <i>v.</i>	161	Park <i>v.</i> Hammond	344
Marsh <i>v.</i> Pedder	257	Parker <i>v.</i> James	112
Marshall <i>v.</i> Cliff	133	Parry, Metcalfe <i>v.</i>	123
Martin, Teed <i>v.</i>	90	Patterson, Wyndham <i>v.</i>	286
Masson, Chippendale <i>v.</i>	174	Pearce <i>v.</i> Cowie	363
Maving <i>v.</i> Todd	225	Pearson, Faith <i>v.</i>	357
Mawson, Allan <i>v.</i>	115	Pedder, Marsh <i>v.</i>	257
Metcalfe <i>v.</i> Parry	123	Peel <i>v.</i> Price	243
_____, Stone <i>v.</i>	217	Penn <i>v.</i> Bennett	205
Meyer <i>v.</i> Everth.....	22	Perry <i>v.</i> Bouchier	80
Middleton <i>v.</i> Sandford	34	Phillips <i>v.</i> Beer	266
Miles, Doe <i>v.</i>	373	Phipson <i>v.</i> Kneller	285
Millar <i>v.</i> Heinrick	155	Pickering <i>v.</i> Rudd	219
Miln <i>v.</i> Prest	393	Pontiguy, Gandell <i>v.</i>	375
Mitchell, Price <i>v.</i>	200	Potts, Hunter <i>v.</i>	203
_____, Raitt <i>v.</i>	146	Power <i>v.</i> Walker	8
_____, v. Scaife	298	Pratt, Moses <i>v.</i>	297
Moir <i>v.</i> Royal Exchange Assurance Company.....	84	Prest, Miln <i>v.</i>	393
Moon, Dowell <i>v.</i>	166	Price <i>v.</i> Mitchell.....	200
Moorsom <i>v.</i> Page.....	103	_____, Peel <i>v.</i>	243
Mortimer <i>v.</i> Salkeld.....	42	Pulling, Moxon <i>v.</i>	50
Moses <i>v.</i> Pratt.....	297	Raitt <i>v.</i> Mitchell.....	146
Moxon <i>v.</i> Pulling.....	50	Ramsbottom, Hooper <i>v.</i>	121
Munro <i>v.</i> De Chemant.....	215	Redhead <i>v.</i> Cater.....	188
Myers, Welch <i>v.</i>	368	Rex <i>v.</i> Barr	16
Nelson, Davenport <i>v.</i>	26	_____,v. Buckingham, Marquis of	189
Newnham, Ridsdale <i>v.</i>	111	Davis	48
Noyes, Chesner <i>v.</i>	129	_____,v. Dixon	12
O'Reilly <i>v.</i> Gonne	249	_____,v. Hamlyn	379
O'Reilly <i>v.</i> Royal Exchange Assurance Company.....	246	Reynolds, Davis <i>v.</i>	267
Orme <i>v.</i> Young	336	Richardson <i>v.</i> London Assurance Company	94
Guthwaite, Luntley <i>v.</i>	179	Richmond <i>v.</i> Heapy	207
		_____,v. Ridsdale	111
		_____,v. Shedden	107

NAMES OF THE CASES.

xi

Robertson, Houston <i>v.</i> ... Page	342	Taylor <i>v.</i> Curtis	Page 337
_____, Underwood <i>v.</i>	138	Teed <i>v.</i> Martin.....	90
Rose <i>v.</i> Rowcroft.....	245	Tempany <i>v.</i> Burnand	29
Rosher <i>v.</i> Kieran.....	87	Thorne, Bluck <i>v.</i>	191
Rosslyn, Earl of, <i>v.</i> Jodrell....	303	Thompson <i>v.</i> Wagner	335n.
Royal Exchange Assurance Co., M'Dougle <i>v.</i>	283	Thornton <i>v.</i> Lance	231
_____, Moir <i>v.</i>	84	Todd, Maving <i>v.</i>	225
_____, O'Reilly <i>v.</i>	246	Townrow, Battey <i>v.</i>	5
Rowcroft, Rose <i>v.</i>	245	Travers, Spear <i>v.</i>	251
Rudd, Pickering <i>v.</i>	219	Trotman <i>v.</i> Dunn.....	211
Sadler <i>v.</i> Leigh.....	195	Tyrwhitt, Baker <i>v.</i>	27
Salkeld, Mortimer <i>v.</i>	42	Vertue <i>v.</i> Jewell	31
Sampson <i>v.</i> Chambers.....	221	Underwood <i>v.</i> Robertson.....	138
Sanderson <i>v.</i> Busher	54n.	Usher <i>v.</i> Dauncey	97
Sandsford, Middleton <i>v.</i>	34	Wagner, Thompson <i>v.</i>	335n.
Sandom <i>v.</i> Bourn	68	Wakefield, Habberton <i>v.</i>	58
Scaife, Mitchell <i>v.</i>	298	Walker, Power <i>v.</i>	8
Scott, Grigg <i>v.</i>	339	Walton <i>v.</i> Hastings.....	223
_____, Warwick <i>v.</i>	62	Waring, Heywood <i>v.</i>	291
Shedden, Ridsdale <i>v.</i>	107	Warwick <i>v.</i> Scott.....	62
Sheels <i>v.</i> Davies	119	Watson <i>v.</i> King	272
Sills <i>v.</i> Laing	81	Welch, Doe <i>v.</i>	264
Simmons, Aldridge <i>v.</i>	392	_____ <i>v.</i> Myers	368
Simpkin, Gillan <i>v.</i>	241	Westwood <i>v.</i> Bell.....	349
Spear <i>v.</i> Travers	251	Wilkinson <i>v.</i> Clay	171
Spence, Busk <i>v.</i>	329	_____ <i>v.</i> Hartley	127
Stevens <i>v.</i> Jackson	160	Willan, Strother <i>v.</i>	24
Staniforth, Henry <i>v.</i>	27	Williams, Loeschman <i>v.</i>	184
Stelf <i>v.</i> Halford.....	17	Winteringham, Delamainer <i>v.</i>	186
Stockfleth <i>v.</i> De Tastet	10	Withers <i>v.</i> Lyss	237
Stone <i>v.</i> Metcalfe	217	Worms, Granger <i>v.</i>	83
Strother <i>v.</i> Willan	24	Wyndham <i>v.</i> Patterson	286
Sugars <i>v.</i> Brinkworth	46		
Synge, Adamthwaite <i>v.</i>	372	Young, Orme <i>v.</i>	336

R E P O R T S

OF

C A S E S

DETERMINED AT

N I S I P R I U S,

IN THE COURTS OF

King's Bench and Common Pleas,

AND ON

THE CIRCUIT,

FROM THE

Sittings after EASTER TERM, 54 GEO. III. 1814,

TO THE

Sittings after HILARY TERM, 56 GEO. III. 1816,

BOTH INCLUSIVE.

BY JOHN CAMPBELL.

OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

Si d^re interpretatione legis queratur; in primis inspiciendum est, quo jure civitas retro in ejusmodi casibus usit fuisset.

PAND. L. i. t. 3.

VOL. IV.

LONDON:

JOSEPH BUTTERWORTH AND SON, LAW BOOKSELLERS,
43, FLEET STREET.

1816.

LONDON :
Printed by Littlewood and Green,
16, Old Bailey.

WANT of leisure having compelled me to discontinue the publication of decisions at *Nisi Prius*, I cannot omit this opportunity to present my acknowledgments to my friends for the valuable assistance which they have rendered me in the course of this undertaking, and to the profession at large for the kindness with which my labours have been received.

INNER TEMPLE,
Michaelmas Term, 1816.

